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

DAVID FISK and MARGARET FISK, husband and wife, *Plaintiffs*,	Case No. **CV 2017 1802**
vs.	**MEMORANDUM DECISION AND ORDER: DENYING PLAINTIFFS' MOTION TO AMEND COMPLAINT; DENYING PLAINTIFFS' MOTIONS FOR RECONSIDERATION; and ORDER REGARDING FEES AND COSTS**
JEFFERY D. McDONALD, M.D., an individual; and NORTH IDAHO DAY SURGERY, LLC, d/b/a NORTHWEST SPECIALTY HOSPITAL, *Defendants*.	

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This medical malpractice case arises out of the treatment and care of plaintiff Margaret Fisk (Margaret) at a facility operated by defendant North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital (the Hospital). The matters currently before the Court are the plaintiffs' Motion for Reconsideration: Northwest Specialty Hospital (filed June 21, 2018), plaintiffs' Motion for Reconsideration: Defendant Jeffery D. McDonald, M.D. (filed June 22, 2018), plaintiffs' Motion to Amend (filed June 7, 2018), defendant Northwest Specialty Hospital's Motion for Costs and Fees (filed June 20, 2018), and defendant Jeffery McDonald's Memorandum of Costs (filed June 22, 2018). [note, all pleadings spell Dr. McDonald's first name as "Jeffery", but the Hospital's website spells Dr. McDonald's name "Jeffrey". The Court will use the parties' spelling.]

On May 31, 2018, this Court filed its Memorandum Decision and Order Granting in Part and Denying in Part Hospital's Motion to Strike Plaintiffs' Expert Witness Disclosure;

Granting Hospital's Motion for Summary Judgment; and Granting McDonald's Motion for Summary Judgment. The Court found the Fisks had not produced admissible evidence showing that at least one of their expert witnesses has actual knowledge of the applicable standard of health care practice, and thus, the Court granted defendants' summary judgment motions.

The following factual summary of the history of this case is from this Court's Memorandum Decision and Order Granting in Part and Denying in Part Hospital's Motion to Strike Plaintiffs' Expert Witness Disclosure; Granting Hospital's Motion for Summary Judgment; and Granting McDonald's Motion for Summary Judgment.

The Hospital is a specialty acute care hospital located in Post Falls, Idaho. Dr. McDonald is board certified in neurological surgery. In March of 2015, Dr. McDonald practiced medicine at the Hospital. He was also a member of Northwest Doctors, LLC, which was a member of North Idaho Day Surgery, LLC, and a member of North Idaho Neurosurgery & Spine, PLLC. Decl. Nathan S. Ohler (Ohler Decl.), at Ex. A, at 8.

On March 10, 2015, Dr. McDonald performed an out-patient cervical spinal fusion on Margaret at the Hospital's facility. The Hospital provided nursing care and treatment to Margaret before, during, and immediately after her surgery. Jessica Sholtz (NP Sholtz) was the nurse practitioner who assisted Dr. McDonald in caring for Margaret. Fisks claim NP Sholtz was employed by the hospital. Counsel for the Hospital at oral argument on May 23, 2018, claimed NP Sholtz was not an employee of the Hospital and has no supervising physician. Margaret's surgery was reportedly uneventful and without immediate complications.

The next day, March 11, 2015, the Hospital nursing staff prepared to discharge Margaret. At approximately 12:45 p.m., prior to her discharge, Margaret began experiencing abdominal discomfort and nausea. Decl. Suzanne Nebeker (Nebeker Decl.),

at Ex. B.[1] The Hospital nursing staff prescribed Margaret a Dulcolax suppository for constipation. *Id.* At approximately 3:00 p.m., Margaret experienced a large emesis (vomiting). *Id.* The Hospital nursing staff reported this to NP Sholtz, which prompted NP Sholtz to postpone Margaret's discharge. *Id.* Margaret's symptoms continued to worsen throughout the day and into the evening. *Id.* Between approximately 7:45 p.m. and 9:00 p.m., the Hospital nursing staff's notes indicate that Margaret was experiencing nausea with intermittent retching emesis and severe abdominal pain. *Id.* The Hospital nursing staff periodically notified NP Sholtz about Margaret's condition, and NP Sholtz provided the Hospital nursing staff with additional orders as a result. *Id.*

Early the next morning, on March 12, 2015, at approximately 1:26 a.m., Margaret told the Hospital nursing staff that her stomach hurt and she felt like she was dying. *Id.* At around the same time, she vomited what was described as a coffee-ground emesis. *Id.* At 2:30 a.m., Margaret was still vomiting coffee-ground emesis. *Id.* Because of Margaret's condition, the Hospital nursing staff contacted NP Sholtz, and NP Sholtz ordered the Hospital nursing staff to consult with the on-call Intensivist. *Id.* The on-call Intensivist recommended that Margaret be transferred to Kootenai Medical Center for a gastrointestinal consult and a possible endoscopy. *Id.* The Hospital nursing staff related the Intensivist's recommendation to NP Sholtz. *Id.* In response to the Intensivist's recommendation, NP Sholtz reportedly told the Hospital nursing staff to keep Margaret at the Hospital's facility for a possible "scope" later that morning. *Id.*; Aff. Counsel Dennis P. Wilkinson (Wilkinson Aff.), Ex. A, Dep. Tr. 22:25–23:7. NP Sholtz disputes this, but, since the facts are construed in favor of the non-moving party, what is pertinent is what

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[1] In general, the Court used the timeline prepared by Suzanne Nebeker, an expert witness for the Fisks, to set forth this case's factual background. Suzanne Nebeker states that she used Margaret's medical records to prepare the timeline. The Court notes that the timeline appears to be mostly consistent with Margaret's medical records submitted as attachments to the Affidavit of Denise Fowler, R.N., an expert witness for the Hospital. *See generally* Aff. Denise Fowler (Fowler Aff.), at Ex. B.

happened from the Fisks' perspective. Over the next several hours, Margaret reported her abdominal pain as rating a ten-out-of-ten. Nebeker Decl., at Ex. B.

At 6:00 a.m., NP Sholtz reported to the Hospital facility "to round on" Margaret. *Id.* By 6:45 a.m., NP Sholtz was trying to coordinate a gastrointestinal consult. *Id.* At approximately 7:45 a.m., the Hospital nursing staff's notes indicate that Margaret's abdomen was distended and firm with no bowel sounds and her pain remained at a ten-out-of-ten. *Id.* The same notes also indicate that John L. Pennings, M.D. (Dr. Pennings), arrived at the Hospital's facility to complete the gastrointestinal consult; Dr. McDonald appears to have been present for the consult. *Id.* Based on his examination, Dr. Pennings believed Margaret was in "terminal phase shock" and ordered the Hospital nursing staff to prepare Margaret for surgery. Aff. Counsel Def. N. Idaho Day Surgery Mot. Summ J. (Def. Counsel Aff.), Ex. A, Dep. Tr. 49:1–13. Shortly thereafter, Dr. Pennings performed an exploratory laparotomy. Nebeker Decl., at Exs. A, B. He discovered Margaret had developed mesenteric artery ischemia, i.e., a loss of blood supply to the small intestines leading to end-organ loss. *Id.* at Ex. B; Aff. Jeffery Larson (Larson Aff.) 5–6, ¶¶ 17–18. As a result, Dr. Pennings removed a significant amount of Margaret's small intestines. Nebeker Decl., at Ex. B; Larson Aff. 5–6, ¶¶ 17–18. Margaret's colon was also ischemic, so Dr. Pennings performed a total abdominal colectomy with an end ileostomy. Nebeker Decl., at Ex. B. After the surgery, at approximately 12:18 p.m., Margaret was transferred to the Intensive Care Unit at Kootenai Medical Center due to her critical condition. *Id.*

Fisks filed their Complaint in this case on March 1, 2017. At the conclusion of the August 17, 2017, Scheduling Conference, this Court scheduled this case for a jury trial beginning September 10, 2018. As a result of that Scheduling Conference, on August 22, 2017, this Court issued its Scheduling Order. Under the terms of that Scheduling Order,

plaintiffs' expert witness disclosure was due about January 15, 2018. On January 16, 2018, plaintiffs filed Plaintiffs' Notice of Compliance, notifying the Court that plaintiffs had provided Plaintiffs Expert Witness Disclosures to the defendants.

On April 3, 2018, defendant Northwest Specialty Hospital filed a Motion to Strike Plaintiffs' Expert Witness Disclosures and Motion to Exclude Plaintiffs' Experts, and a Motion for Summary Judgment. On April 24, 2018, defendant Jeffery McDonald, M.D., filed a Motion for Summary Judgment. Oral argument on these motions was held on May 23, 2018. As mentioned above, on May 31, 2018, this Court filed its Memorandum Decision and Order Granting in Part and Denying in Part Hospital's Motion to Strike Plaintiffs' Expert Witness Disclosure; Granting Hospital's Motion for Summary Judgment; and Granting McDonald's Motion for Summary Judgment. Summarizing that decision, this Court found the Fisks, in their expert witness disclosure, did not need to demonstrate their experts had actual knowledge of the local standard of health care practice, and thus, the Fisks had not run afoul of the expert disclosure requirements (except as to witness David Smith, upon whom the Court found the Fisks had not met the expert disclosure requirements). However, what is required on summary judgment is different than what is required for expert witness disclosure. The Court found the Fisks had not produced admissible evidence showing that at least one of their expert witnesses has actual knowledge of the applicable standard of health care practice, and thus, the Court granted defendants' summary judgment motions.

Following that May 31, 2018, decision, the Fisks first filed a Motion to Amend on June 7, 2018, asking the Court to allow plaintiffs to amend their complaint to add a claim that Dr. McDonald be held personally responsible for the actions of Jessica Sholtz under I.C. § 30-1306. On September 27, 2018, defendant Northwest Specialty Hospital filed a Memorandum in Opposition to Motion to Amend, arguing a) the Fisks fail to state a valid

claim, b) the statute of limitations bars such amendment, and c) the motion is untimely and does not relate back. On October 3, 2018, defendant Dr. McDonald filed an Opposition to Motion to Amend, making the same arguments made by Northwest Specialty Hospital, and adding that plaintiffs have not shown any "good cause" for the amendment and that such amendment would be an impermissible collateral attack.

Second, on June 21, 2018, the Fisks filed their Motion for Reconsideration: Northwest Specialty Hospital, and the next day the Fisks filed their Motion for Reconsideration: Defendant Jeffery D. McDonald, M.D. On August 15, 2018, defendant Dr. McDonald filed an Opposition to Plaintiffs' Motion for Reconsideration, arguing plaintiffs never sought relief under I.R.C.P. 56(d) throughout the summary judgment process, and that the Fisks have failed to show good cause for relief under I.R.C.P. 60(b). On August 16, 2018, defendant Northwest Specialty Hospital filed an Opposition to Plaintiffs' Motion for Reconsideration Re: Northwest Specialty Hospital.

Finally, on June 20, 2018, defendant Northwest Specialty Hospital filed its Motion for Attorney Fees and Costs, to which the Fisks filed an objection on July 5, 2018. On August 17, 2018, defendant Northwest Specialty Hospital filed its Reply to Plaintiffs' Objection to Motion for Costs and Fees. On June 22, 2018, defendant McDonald filed a Memorandum of Costs, to which plaintiffs filed an objection on July 5, 2018.

Oral argument on these matters was held on October 10, 2018. The entire time period for oral argument was consumed with the Fisks' motions for reconsideration. Counsel for the Fisks stated he would stand on his briefing for the plaintiffs' Motion to Amend and as to the Fisks' objections to costs and fees. At the conclusion of that hearing, the Court took all these matters under advisement.

II. STANDARD OF REVIEW.

A. Motion to Amend.

A decision to grant or deny a motion to amend is reviewed under an abuse of discretion standard. *Black Canyon Racquetball Club v. Idaho First Nat'l Bank, N.A.,* 119 Idaho 171, 175, 804 P.3d 900,904 (1991); *Pandrea v. Barrett,* 160 Idaho 165, 171, 396 P.3d 943, 949 (2016), citing *Barmore v. Parrone*, 145 Idaho 340, 344, 179 P.3d 303, 307 (2008).

B. Motion to Reconsider.

In deciding a motion for reconsideration, the district court must apply the same standard of review required for the order that is being reconsidered; and the "[t]he district court evaluates a motion to reconsider an order granting summary judgment by employing the summary judgment standard . ." *Franklin Bldg. Supply Co. v. Hymas,* 157 Idaho 632, 636, 339 P.3d 3S7, 361 (2014); *Pandrea,* 160 Idaho at 171, 396 P.3d at 949. As with Rule 59(e) proceedings, the right to grant, or deny, relief under the provisions of Rule 60(b) is a discretionary one with the trial court.
Johnston v. Pascoe, 100 Idaho 414, 420, 599 P.2d 985, 991 (1979). "A trial court's disposition of a . . . Rule 60(b) motion will be upheld unless the court has manifestly abused the wide discretion vested in it." *Alderson v. Bonner,* 142 Idaho 733, 743, 123 P.3d 1261, 1271 (Ct.App. 2006). The same standard applies for decisions made pursuant to I.R.C.P 59(e). *Pandrea,* 160 Idaho at 171, 369 P.3d at 949.

C. Motion for Costs and Fees.

An award of attorney fees and costs rest in the sound discretion of the trial court, and the burden is on the person disputing the award to show an abuse of discretion. Anderson v. Ethington, 103 Idaho 658, 659, 651 P.2d 923, 924 (1982); Richard J. & Esther E. Wooley Trust v. DeBest Plumbing, Inc., 133 Idaho 180, 186-87, 983 P.2d 834, 840-41 (1999).

III. ANALYSIS.

A. The Plaintiffs' Motion to Amend is Denied.

In their Motion to Amend, the Fisks now claim that Dr. McDonald (and not his business (North Idaho Neurosurgery, PLLC) is personally responsible for the acts and omissions of his nurse practitioner, Jessica Sholtz, citing I.C. § 13-1306. Pl.s' Mot. Amend 2, ¶¶ 2-5. The Fisks argue Dr. McDonald was the sole supervisor of Jessica Sholtz. *Id.* Idaho Code § 13-1306 reads:

> Any officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom such professional services were being rendered.

Northwest Surgical Hospital appropriately argues that at least as to the Hospital, the proposed Amended Complaint should be denied because it does not include any factual or legal allegations against the Hospital. Def.'s Northwest Specialty Hospital's Mem. Opp'n. to Pl.s' Mot. Amend 4. The Hospital is correct in this regard. The Hospital next argues that Nurse Practitioner Sholtz has not been a party up to this time, and any cause of action against her or her employer, North Idaho Neurosurgery and Spine, LLC, would be barred by the two-year statute of limitations. *Id.* The Hospital is correct on this point as well. Finally, the Hospital argues plaintiffs do not meet the requirements of I.R.C.P. 15(c), and thus, the proposed amendments do not relate back to the time of the filing of the initial complaint. *Id.* 5-6. The Hospital correctly points out there is a "notice" requirement to I.R.C.P. 15(c), and this Court has already found the notice requirement to Dr. McDonald is lacking. Idaho Rule of Civil Procedure allows that an amendment to a pleading will relate back to the date of the original pleading when, among other things, the party to be brought in by amendment "knew or should have known that the action would have been brought against it, but for a mistake concerning the party's identity."

Id. 6, citing I.R.C.P. 15(c)(1)(C)(ii). The Hospital correctly points out that this Court has already held:

> As noted, the Fisks suggest that Dr. McDonald is vicariously liable for NP Shotltz's acts or omissions; however, the Fisks do not explain under what theory—express authority, implied authority, or apparent authority—supports their assertion of vicarious liability. Idaho recognizes three types of agencies: express authority, implied authority, and apparent authority. *Bailey v. Ness*, 109 Idaho 495, 497, 708 P.2d 900, 902 (1985). Neither express authority, implied authority, nor apparent authority are a cause of action; rather, they are legal theories through which agency arises. *Navo v. Bingham Mem. Hosp.*, 160 Idaho 363, 373, 373 P.3d 681, 693 (2016).
>
> In their Complaint, the Fisks clearly allege a cause of action against Dr. McDonald for negligence. Compl. 7–8, ¶¶ 45–48. They state that Dr. McDonald was negligent in the care and treatment he provided Margaret and that his negligence injured Margaret. *Id.* However, while the Fisks state an underlying cause of action for negligence, they do not allege that Dr. McDonald is liable to them for NP Sholtz's acts and omissions, nor do the facts they recite in their Complaint suggest the possibility of liability arising under such a theory. For example, the Fisks do not allege the existence of an employer-employee or principal-agent relationship between Dr. McDonald and NP Sholtz, and they do not link Dr. McDonald's liability to NP Sholtz's conduct; rather, his alleged liability appears to be premised entirely on his own conduct (i.e., his failure to monitor Margaret's symptoms). Furthermore, when the Fisks' claim against the Hospital is compared to the claim against Dr. McDonald, it is evident that when drafting their Complaint the Fisks intended to hold the Hospital, but not Dr. McDonald, vicariously liable for the acts and omissions of its employees and agents. *Compare* Compl. 2, 7, ¶¶ 3, 43, *with* Compl. 2, 7, ¶¶ 4, 47. Altogether, there is nothing in the Fisks' Complaint that would have put Dr. McDonald on notice that the Fisks intended to hold him liable for NP Sholtz's acts or omissions. As a result, the Court concludes that the Fisks have not properly pled a theory of express authority, implied authority, or apparent authority and, therefore, they are precluded from making that argument in response to Dr. McDonald's Motion for Summary Judgment.

Mem. Decision and Order Granting in Part and Den. in Part Hospital's Mot. to Strike Pl.s' Expert Witness Disclosure; Granting Hospital's Mot. for Sum. J.; and Granting McDonald's Motion for Summary Judgment, 55-56.

Dr. McDonald makes the same arguments opposing amendment as made by the Hospital. Additionally, Dr. McDonald argues the Fisks have shown no "good cause"

under I.R.C.P. 16(a)(3) and this Court's pretrial order (McDonald' Opp. To Pls.' Motion to Amend 7-8), and allowing amendment would allow the Fisks to make an impermissible collateral attack against the judgment Dr. McDonald already has. *Id.* 10-11. The Court finds these two arguments lacks merit.

The argument is that I.R.C.P. 16(a)(3) allows the dates set by the court for trial "must not be modified except by leave of the court on a showing of good cause", and since allowing amendment of the complaint would necessitate a continuance of the trial (until summary judgment was granted, a three-week jury trial was scheduled to take place beginning September 10, 2018). This Court can find no legitimate reason to graft on to I.R.C.P. 15(c), a "good cause" requirement lifted from I.R.C.P. 16.

Dr. McDonald's argument that since he has a judgment, following summary judgment, allowing amendment at this time would allow the Fisks to collaterally attack that judgment. The Court finds such an argument would render relief provided under I.R.C.P. 60 meaningless.

However, the argument raised by both the Hospital and by Dr. McDonald, that the Fisks' motion to amend is time barred by the applicable statute of limitations, and that any amendment would not relate back under I.R.C.P. 15(c)(1)(C)(ii), is what compels this Court to deny the Fisks' motion to amend. Under that rule, notice is required to Dr. McDonald that the Fisks intended to hold him responsible for NP Sholtz's acts. As stated by this Court previously, "Altogether, there is nothing in the Fisks' Complaint that would have put Dr. McDonald on notice that the Fisks intended to hold him liable for NP Sholtz's acts or omissions." Mem. Decision and Order Granting in Part and Den. in Part Hospital's Mot. to Strike Pl.s' Expert Witness Disclosure; Granting Hospital's Mot. for Sum. J.; and Granting McDonald's Motion for Summary Judgment, 56. That finding is dispositive as to the Fisks' Motion to Amend Complaint. The Fisks

now claim on reconsideration, "Plaintiffs incorporate their prior filings, particularly Section VII of Plaintiffs' Opposition to Dr. McDonald's Motion f or Summary Judgment, into this Motion and Memorandum. In that filing, the nature of the relationship between Dr. McDonald and Jessica Sholtz is documented." Pl.s' Mot. Amend 2, ¶ 4. First, it is not what the Fisks put in their brief in opposition to Dr. McDonald's motion for summary judgment that matters; what matters is what the Fisks put in their Complaint. There is nothing in Fisks' Complaint that would have given Dr. McDonald notice that Fisks intended to hold him liable for NP Sholtz's actions. Second, the Fisks, in Section VII of their brief in opposition to Dr. McDonald's motion for summary judgment, in its entirety, write:

> Defendant McDonald cannot escape his liability for his nurse practitioner Jessica Sholtz's negligent acts and omissions. Defendant McDonald admits, in Interrogatory Responses and in his deposition that he should have seen Mrs. Fisk personally by 2:30 a.m., and that Jessica Sholtz should have agreed with the hospital's intensivist to transfer Ms. Fisk to Kootenai in the early morning hours of March 12, 2015. "Had he been aware of the details of the patient's course as reflected in the medical record of Northwest Specialty Hospital, Defendant McDonald would have seen the patient at 2:30 a.m. on March 12, 2015, and would have followed the recommendation of Drs. Foster and Joshi to transfer the patient to Kootenai Health." It was Jessica Sholtz who prevented the recommended transfer.

Pls.' Mem. in Opp'n to Def. Jeffery D. McDonald's Mot. Summ. J. 19, citing Wilkinson Aff.; at Exhibit A, p. 22-23; Exhibit C, Answer No. 28. That Memorandum was filed on May 9, 2018. Exhibit A to Fisks' counsel's Wilkinson's Affidavit is the deposition transcript of Dr. McDonald, taken on November 20, 2017. Thus, this Court finds that no later than November 17, 2017, was the time in which the Fisks should have filed a Motion to Amend. For whatever reason, they chose not to. Instead, the Fisks chose to file their Motion to Amend after summary judgment had been granted against them. Additionally, there is really nothing testified to by Dr. McDonald that put him on notice

that the Fisks would seek to hold him liable for Sholtz's actions. The portion cited by Fisks in the Motion to Amend is as follows:

> Q. Do you know why Mrs. Fisk was not transferred [to Kootenai Health hospital]?
> A. I know now in retrospective. I have at least an understanding of it.
> Q. Yes. What's your understanding?
> A. There's a photocopy of an order that was apparently a verbal order from Jessica Sholtz saying do not transfer the patient. That's in the medical record of the hospital. So I assume that's where it came from.
> Q. If you had been at the hospital or at least accessible on the telephone of when you – and were informed of the vital signs as we see on Exhibit No. 12, 2ould you have transferred?
> * * *
> A. Yes.
> Q. And would that decision have been based only on those vital signs or would it have been based on other information such as her reports of pain?
> A. Would not have had anything to do with her report of pain. It would have been based on the vital signs and the consultant's apparent recommendation to transfer.

Wilkinson Aff.; at Exhibit A, p. 22, L. 25 – p. 23, L. 22. Nothing about that testimony establishes NP Sholtz's employment status or who her supervisor might be. Nothing about that testimony establishes Dr. McDonald's authority or ability to control and supervise NP Sholtz.

Additionally, Fisks have not met the time limitation provision under I.R.C.P. 15(c)(1)(C)(ii), which requires the motion to amend be brought within the six-month time limitation for serving the summons under I.R.C.P. 4(b)(2). That deadline would have passed approximately September 2, 2017, six months after the summons was issued on March 2, 2017.

The Court appreciates this is a matter committed to the Court discretion and believes it is acting within those bounds. The Fisks' Motion to Amend Complaint is denied.

B. The Plaintiffs' Motions for Reconsideration are Denied.

Fisks' motion to reconsider was filed after final judgment was entered in favor the Hospital and Dr. McDonald. As a result, it is governed by I.R.C.P. 59(6) and 60(b). Idaho Rule of Civil Procedure 59(6) does not permit the introduction of new evidence. *Johnson v. Lambros,* 143 Idaho 468, 471, 147 P.3d 100, 103 (Ct.App. 2006). Since the pending motion seeks relief from the judgment to bring new claims against Dr. McDonald, it is also subject to Rule 60(b). Where . . . the motion for "reconsideration" raises new issues, or presents new information, not addressed to the court prior to the decision which resulted in the judgment, the proper analogy is to a motion for relief from judgment under Rule 60(b). *Lowe v. Lym,* 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982). That rule requires a showing of good cause and specifies particular grounds upon which relief may be afforded. *Hendrickson v. Sun Valley Corporation, Inc,* 98 Idaho 133, 134, 559 P.2d 749, 750 (1977). In *Lowe,* the Idaho Court of Appeals affirmed the trial court's decision that buyers failed to show good cause for the submission of new information following award of summary judgment in favor of seller. 103 Idaho at 263-64, 646 P.2d at 1034-35.

> Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that had occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. *First Security Bank v. Neibaur,* 98 Idaho 598, 570 P.2d 276 (1977). Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.

Id.

Both forms of relief under I.R.C.P. 59 and 60 require a showing of good cause. This Court finds the Fisks have failed in this regard. Indeed, neither the Fisks' motion for reconsideration regarding Dr. McDonald, nor the Fisks' motion for reconsideration regarding Northwest Specialty Hospital, mentions one word about "good cause." Pls.' Mot. for Recons.: Def. Jeffery D. McDonald, M.D. 1; Pls.' Mot. for Recons.: Northwest

Specialty Hospital, 1. In Fisks' briefing, the expression "good cause" is never mentioned. Mem. in Supp. of Pls.' Mot for Recons.: Def. Jeffery D. McDonald, 1-4; Mem. in Supp. of Pls.' Mot. for Recons.: Northwest Specialty Hospital, 1-6.

The entire focus by Fisk in their short memorandum regarding Dr. McDonald is "evidence" Fisk claims support their claim that Dr. McDonald was Sholtz's supervisor. Mem. in Supp. of Pls.' Mot for Recons.: Def. Jeffery D. McDonald, 1-4. But again, the "evidence" cited is Dr. McDonald's deposition testimony, and his deposition was taken on November 20, 2017. Since Fisks had that "evidence" on November 20, 2017, why is it they did not *immediately* move to amend their complaint to specifically add allegations that Dr. McDonald was responsible for the actions of Sholtz? Counsel for Fisks, at this motion for reconsideration juncture, completely ignore the fact that at no time prior to or at the May 23, 2018, hearing on the defendants' motions for summary judgment did the Fisks move for a continuance under I.R.C.P. 56(d) to allow them to clarify or strengthen that evidence as to NP Sholtz and make legal argument to defend their clients, the Fisks, from impending summary judgment against them. Counsel for Fisks, at this motion for reconsideration juncture, completely ignore the fact that at no time prior to or at the May 23, 2018, hearing on the defendants' motions for summary judgment, did the Fisks move to amend their complaint to allege a cause of action against Dr. McDonald for the acts of NP Sholtz.

This Court wishes the facts were different. There can be no doubt that the Fisks' lives have been permanently, significantly and irreparably damaged due to Margaret Fisk losing most of her intestines. There can be no doubt they have suffered damage. There can be no doubt that the longer emergency surgery was delayed, more of Margaret Fisk's intestines were irreparably damaged. Logic tells us that someone, or more than one person, *waited too long* to get Margaret Fisk into that emergency

surgery. This Court has already found there is evidence of causation to allow the Fisks' case to survive summary judgment on that causation issue. Mem. Decision and Order Granting in Part and Den. in Part Hospital's Mot. to Strike Pl.s' Expert Witness Disclosure; Granting Hospital's Mot. for Sum. J.; and Granting McDonald's Motion for Summary Judgment, 57. The Fisks will not be able to hold anyone accountable because the Fisks lack evidence that their experts are knowledgeable about the local standard of care at the relevant time.

Just as someone *waited too long* to give Margaret Fisk the medical help she needed, the Fisks' attorneys *waited too long* to amend the Fisks' complaint, and the Fisks' attorneys *waited too long* to bring their experts up to speed on the standard of care in this community at the relevant time. This Court cannot help but believe that having their experts become familiar with the local standard of care at the relevant time was a task that could have been performed. Counsel for Fisks, for whatever reason, chose to never perform that task, not even at this motion for reconsideration stage. Counsel for Fisks completely failed to discuss the standard of care issue in their motion for reconsideration against Dr. McDonald. Pls.' Mot. for Recons.: Def. Jeffery D. McDonald, M.D. 1-4. In Fisks' motion for reconsideration against the Hospital, counsel for Fisks argue the standard of care has now been established through new affidavits of their experts: Nurse Practitioner expert Suzanne Nebeker, FNP-BC; Nursing Expert, Vernon Robert Kubiak, KNP, CNP, CNS-BC, PMHNP-BC, RN; and Hospital Expert Timothy Hopkins, FACJE, CHSP. Pls.' Mot. for Recons.: Northwest Specialty Hospital, 5-9. The Court has reviewed the new affidavits. The Court is persuaded for the same reasons set forth by the Hospital: these new affidavits and new arguments regarding those affidavits do not change this Court's decision on summary judgment…the Fisks failed to present admissible evidence reflecting actual knowledge of the applicable

standard of health care practice as required by I.C. § 6-1012 and I.C. § 6-1013. Def. North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital's Opp'n to Pls.' Mot. for Recons. Re: Northwest Specialty Hospital, 3-27. The Court agrees with all arguments presented by the Hospital in that brief.

This Court finds, from a factual standpoint, the Fisks have presented no new evidence to support their motion to reconsider. This Court agrees with the Hospital's argument that Nebeker's new Declaration: does not provide the ANA guidelines for this Court to review to determine whether those guidelines provide some cognizable standard applicable to this case (*Id.* 3); does not provide any testimony by Nurse Miller (*Id.*); does not provide the contents of communications Nebeker had with Odom, Wagner and Moore (*Id.* 4-5); and provides no admissible evidence reflecting actual knowledge of the local standard of care through familiarizing sources (*Id.* 18-24). This Court agrees with the Hospital's argument that Kubiak's new Declaration fails to make a statement that the local standard of care was replaced by, or is the same as a statewide or national standard. (*Id.* 5). This Court agrees with the Hospital's argument that Kubiak's new Declaration provides no admissible evidence reflecting actual knowledge of the local standard of care through familiarizing sources (*Id.* 18-24). This Court agrees with the Hospital's argument that Hawkins new Declaration simply explains the origins of the Joint Commission guidelines previously considered by this Court, and does nothing to change this Court's prior finding that in *Navo v. Bingham Memorial Hospital,* 160 Idaho 363, 373, 373 P.3d 681, 691 (2016), the Idaho Supreme Court held that the Joint Commission Standards do not provide a coherent standard of care. Mem. Decision and Order Granting in Part and Den. in Part Hospital's Mot. to Strike Pl.s' Expert Witness Disclosure; Granting Hospital's Mot. for Sum. J.; and Granting McDonald's Motion for Summary Judgment, 40-41.

This Court agrees with the Hospital that the "reasonable inference" standard does not apply with expert testimony. *Id.* 7-8. This Court agrees that the Fisks have not shown "good cause" to consider these new affidavits, and thus, should not be considered (*Id.* 10-13), but even had they established "good cause" for this late disclosure, what has now been disclosed is still insufficient to establish knowledge by the Fisks' experts as to the local standard of care at the relevant time. Accordingly, this Court finds no reason to address the Hospital's additional arguments of waiver by the Fisks (*Id.* 14-15) or that the new evidence was improperly obtained by Fisks' counsel. *Id.* 15-18.

The Court finds the Fisks' motions to reconsider must be denied.

C. The Defendants' Motions for Costs and Fees are Granted and Denied as Follows.

Dr. McDonald requests costs as a matter of right in the amount of $2,972.58 and discretionary costs in the amount of $6,934.56 (comprised of expert fees of $4,275.00 and attorney travel, lodging and meals in the amount of $2,659.56), pursuant to I.R.C.P. 54(d). Def. Jeffery McDonald M.D.'s Mem. of Costs, 1-3. The Fisks argue discretionary costs should not be allowed as they were not exceptional. Pls.' Obj. to Def. Jeffery D. McDonald, M.D.'s Mot. for Costs, 1-3. The Fisks have not objected to Dr. McDonald's request for costs as a matter of right. *Id.* Accordingly, costs as a matter of right in the amount of $2,972.58 are awarded in favor of Dr. McDonald against the Fisks. The Court finds the discretionary costs requested in the amount $6,934.56, were not exceptional. The costs of expert witness fees and attorney travel expenses are not exceptional; they are incurred in nearly any litigation, and certainly are incurred in any medical malpractice litigation. The Court does not grant discretionary costs to Dr. McDonald.

The Hospital has requested costs as a matter of right in the amount of $4,729.34, and discretionary costs in the amount of $32,941.06 (comprised of expert fees of $19,530.00, cost of obtaining medical records from health care providers in the amount of $2,585.18, cost of copying medical records in the amount of $306.38, postage of $75.45, and $10,444.05 for attorney travel expenses). Additionally, the Hospital claims that the Fisks "have pursued this action unreasonably and/or frivolously and therefore, attorney fees are appropriate" in the amount of $151,390.60, pursuant to I.R.C.P. 54(e). Verified Mem. in Supp. of Def. North Idaho Day Surgery, LLC d/b/a Northwest Specialty Hospital's Mot. for Costs and Fees, 5. The Fisks argue the case was not brought or pursued frivolously, the Fisks note that the Hospital failed to state the statutory basis for fees (but analyzes such claim under I.C. § 12-121), the Fisks argue there is not sufficient information to evaluate the amount of fees under I.R.C.P. 54(e)(3), the Fisks argue discretionary costs should not be allowed as they were not exceptional, and the Fisks argue some costs as a matter of right were not documented. Pls.' Obj. To Def. North Idaho Day Surgery LLC, d/b/a Northwest , Specialty Hospital's Motion for Costs and Fees, 1-8. The Hospital responded that the Fisks' objections as to the amount of costs as a matter of right were without basis, that the discretionary costs were exceptional under the recent Idaho Supreme Court case, *Hoagland v. Ada Cty.,* 154 Idaho 900, 914, 303 P.3d 587, 601 (2013), and the Hospital provided slightly more specific argument as to why the Hospital feels the matter was brought or pursued frivolously or without foundation. Def. North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital's Reply to Pls.' Obj. to Def. North Idaho Day Surgery, LLC, d/b/a/ Northwest Specialty Hospital's Mot. for Costs and Fees, 1-5. The Court finds the costs as a matter of right sought be the Hospital in the amount of $4,729.34 are reasonable. The Fisks object to, "the $4,164,34 request for deposition transcripts appears

unreasonable and excessive. Again, without the benefit of seeing the actual cost bill it is difficult to assess…" Pls.' Obj. To Def. North Idaho Day Surgery LLC, d/b/a Northwest , Specialty Hospital's Motion for Costs and Fees, 7-8. That objection is without merit as the costs are detailed in the Verified Memorandum submitted by counsel for the Hospital. Verf'd Mem. in Supp. Mot. Costs and fees, 3; Exhibit "A" to Aff. Of Counsel. Accordingly, costs as a matter of right are awarded in favor of the Hospital against Fisks in the amount of $4,729.34. Discretionary costs in the amount of $32,941.06 are denied. While *Hoagland* may slightly clarify the analysis to be given by the trial Court, this Court finds none of the standards enumerated in *Hoagland* would warrant the granting of discretionary costs in this case. The case was not frivolous. Far from it, the underlying facts of what happened to Margaret Fisk are compelling. However, one crucial element, the local standard of care was not developed, but that does not create frivolous litigation. The Hospital argues "Plaintiffs' own failure to properly prepare this case for trial by obtaining and submitting the necessary and required expert disclosures renders Defendant Hospital's expert costs exceptional." Def. North Idaho Day Surgery, LLC, d/b/a Northwest Specialty Hospital's Reply to Pls.' Obj. to Def. North Idaho Day Surgery, LLC, d/b/a/ Northwest Specialty Hospital's Mot. for Costs and Fees, 4. That is incredibly flawed logic. The failure of Fisks attorneys to get their experts familiar with the local standard of care is unfortunate, but it is not exceptional, at least not vis-à-vis the Hospital. The Hospital would have had to incur its discretionary costs anyway in order to defend this malpractice litigation. Nothing about Fisks' counsels' failure on the standard of care issue changes that. The failure of Fisks' attorneys to get their experts familiar with the local standard of care is what causes the Hospital (and Dr. McDonald) to prevail on summary judgment. As to the Fisks, that failure is exceptional; the Fisks now pay the ultimate price, judgment against them.

They will not see trial. They lose their opportunity to seek justice for what happened to them But as to the Hospital, these discretionary costs are not exceptional, and they in no way become exceptional due to the failure by Fisks' counsel to get their experts familiar with the local standard of care. Accordingly, discretionary costs are denied. Finally, the Court will not grant attorney fees incurred by the Hospital. This is for the same reason just given by the Court as to discretionary costs requested by the Hospital. The case was not frivolous. What happened to Margaret Fisk is horrible. For whatever reason, the local standard of care was not developed, but that does not create frivolous litigation. That creates a windfall of epic proportion to the Hospital and to Dr. McDonald, and an equally epic detriment to the Fisks. To pile on attorney fees in favor of the Hospital, on top of what has already befallen the Fisks, would be unthinkable. The Fisks, through no fault of their own, will never obtain justice in this litigation. This Court will not countenance the Fisks having to pay, again through no fault of their own, the Hospital's attorney fees.

IV. CONCLUSION AND ORDER.

Based on the above reasons, plaintiffs Fisks' Motion to Amend Complaint is denied; plaintiffs Fisks' Motions for Reconsideration are denied; and defendant McDonald's and defendant Hospital's request for costs as a matter of right are granted, all other requests for costs and fees made by defendant McDonald and defendant Hospital are denied.

IT IS HEREBY ORDERED plaintiffs Fisks' Motion to Amend Complaint is DENIED.

IT IS FURTHER ORDERED plaintiffs Fisks' Motion for Reconsideration against defendant McDonald is DENIED and plaintiffs Fisks' Motion for Reconsideration against defendant Hospital is DENIED.

IT IS FURTHER ORDERED defendant McDonald's request for costs as a matter of right in the amount of $2,972.58 is GRANTED in favor of defendant McDonald against plaintiffs Fisks. All other costs sought by defendant McDonald are DENIED.

IT IS FURTHER ORDERED defendant Hospital's request for costs as a matter of right in the amount of $4,729.34 is GRANTED in favor of defendant Hospital against plaintiffs Fisks. All other costs and fees sought by defendant Hospital are DENIED.

IT IS FURTHER ORDERED counsel for defendant McDonald and counsel for defendant Hospital prepare a Judgment consistent with this memorandum decision and order.

Entered this 13th day of November, 2018.

____

John T. Mitchell, District Judge

Certificate of Service

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

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Jeanne Clausen, Deputy Clerk