11-28-2014

Samples v. Hanson Appellant's Brief Dckt. 41869

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID SAMPLES and JAYME SAMPLES, husband and wife, Plaintiffs/Appellants, vs. DR. RAY W. HANSON, individually, and BMH, INC. doing business as BINGHAM MEMORIAL HOSPITAL, and JOHN DOES I-X, individuals and entities presently unknown, Defendants/Respondents.	Case No.: CV-2011-2069 DOCKET NO. 41869

APPELLANTS' BRIEF

APPEALED FROM THE DISTRICT COURT OF THE
SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR BINGHAM COUNTY

HONORABLE DAVID C. NYE
District Judge

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I. PROCEDURAL HISTORY

This matter commenced with the filing of Plaintiffs' Complaint and Demand for Jury Trial on September 27, 2011, arising from David Samples damages suffered as a result of a surgery and post surgical infection at Bingham Memorial Hospital and while under the surgical care of Dr. Ray Hanson, an employee of Bingham Memorial Hospital ("BMH"). R.pp.14-22.

The Defendant, BMH, was served and default was entered on December 5, 2011. R.pp.23-24. The default was subsequently set aside by Stipulation and counsel appeared for the Defendants.

Plaintiffs filed a First Amended Complaint and Demand for Jury Trial on June 14, 2013, and Defendants filed their Answer on August 28, 2013. R.pp.45-61.

On September 20, 2013, Defendants filed a Motion to Strike Plaintiffs' late disclosed experts and a Motion to Dismiss. R.pp.62-85, 88-100. The Court denied the Motion to Dismiss and denied in part and granted in part, the Defendants' Motion to Strike Plaintiffs' Experts. R.pp. 216-223.

From June through October, the Plaintiffs sought to depose the Defendants, Dr. Hanson, and Defendants' experts, without response or cooperation from counsel. R.pp.573-6. This would have assisted Plaintiff in establishing that the standard of care at BMH in 2009 did not differ from 2011. Subsequently in November, after Plaintiffs cooperated in scheduling of their expert for deposition, Plaintiff was informed that Defendants and their experts were unavailable until days before the scheduled trial, or in the case of some witnesses, not at all. R. pp.454-6, 565-589 The Plaintiffs were denied the opportunity to take the deposition of Defendants, Dr. Ray Hanson, Margaret Llinas and Defendants' experts, Drrs. Holman, Miciak and Baird.

Defendants moved to strike Plaintiffs' expert, Dr. Birkenhagen, for failing to establish a foundation of his familiarity with the standard of care. This Motion was granted by the Court by Decision issued January 3, 2014, and Judgment entered January 6, 2014. R.pp.606-624. Plaintiffs filed a timely Notice of Appeal. R.pp.625-628.

II. STATEMENT OF FACTS

This case arises from surgical and post-surgical treatment provided to David Samples ("David") by Dr. Hanson, an employee of BMH, and the immediate predecessor in that position to Plaintiffs' expert, Dr. Kurt Birkenhagen. Dr. Birkenhagen treated David upon his transfer from BMH to Portneuf Medical Center the morning of October 4, 2009. David was extremely sick showing signs of sepsis and infection because Dr. Hanson had failed to detect and repair an ongoing leak in David's transverse colon after a laparoscopic cholecystectomy procedure in which Dr. Hanson tore David's colon. Dr. Hanson opened David's abdomen to attempt repairs, failing to detect all damage which led to David's deteriorating condition post surgery.

Following the procedure, Mr. Samples was under the postoperative supervision and care of Dr. Hanson, as well as other employees and staff of BMH. Mr. Samples exhibited hypoxic condition throughout the day following the procedure and into October 3rd, digressing and developing into adult respiratory syndrome as a result of an ongoing leak in the transverse colon that had not been repaired by Dr. Hanson.

On or about October 4, 2009, Mr. Samples was transferred to Portneuf Medical Center in Pocatello, Idaho and placed under the almost immediate care of Dr. Kurt Birkenhagen, a surgeon employed by Portneuf, who immediately found an advanced abdominal wound infection and ongoing leakage of the transverse colon causing Dr. Birkenhagen to perform immediate surgical procedure followed by numerous medical procedures in the ensuing weeks and months. R.pp. 457-494.

Dr. Birkenhagen opined that Dr. Hanson failed to provide adequate medical care and breached the standard of care by failing to adequately treat and diagnose Mr. Samples' post-

operative leak. Dr. Birkenahagen further opined that the medical records from BMH and Dr. Hanson's care of Mr. Samples reflected alarmingly high blood work or numbers and that that, together with Mr. Samples' respiratory distress, should have caused a reasonable doctor in providing such care under the circumstances and within that community to have reopened the surgical site and examined it for the obvious source of infection. Rather than doing so, Dr. Birkenhagen opined that Dr. Hanson and BMH turned over the care to a hospitalist, Dr. Llinas, and failed to provide ongoing postoperative care and supervision of Mr. Samples' condition leading to Mr. Samples' septic condition at the time of transfer to Portneuf sometime later.

On November 7, 2013, the Defendants moved to Strike the Plaintiffs' expert, Dr. Kurt Birkenhagen, attaching portions of the deposition testimony of Dr. Birkenhagen and alleging that he was not familiar with the applicable standard of health care practice in the community of Blackfoot, Idaho (i.e. BMH) at the time of Samples' medical care from September 30 through October 4, 2009. In response to Defendants' Motion to Strike Plaintiffs' Proposed Expert Dr. Birkenhagen,[1] the Plaintiffs filed an Affidavit of Dr. Birkenhagen, which established the following facts:

1. Dr. Birkenhagen is a general surgeon licensed to practice in the State of Idaho since 1977 and was board certified in surgery and a member of the American College of Surgeons.

2. Dr. Birkenhagen was granted hospital privileges at Bingham Memorial Hospital in the Spring of 2011 and was hired by Bingham Memorial Hospital in August, 2011, to replace the

[1] The Court subsequently deemed this a Motion for Summary Judgment.

Defendant, Dr. Ray Hanson. He clearly was familiar with the standard of care at BMH as of those dates.

3. Dr. Birkenhagen reviewed the qualifications and community standards expected of a similarly qualified surgeon to that of the Defendant, Dr. Ray W. Hanson in the community as of 2009.

4. Dr. Birkenhagen practiced in Pocatello, Idaho as a general surgeon from 1977 until 2011 and was familiar with the standard of care applied to the community based upon his practice in Pocatello, Idaho.

5. Dr. Birkenhagen testified that a surgeon holding himself out as board certified and as a member of the American College of Surgeons must adhere to certain post-surgical standards of care, examination and attention to indications of infection or complication arising from the surgical procedure. This would include conducting and reviewing blood work, testing for changes in white blood count and review of blood work for "bands" that are indicative of infection. Additionally, Dr. Birkenhagen testified that a surgeon of these qualifications with the relevant community should use a full spectrum anaerobic antibiotic during post-surgical recovery to combat and prevent infection.

6. When all such post-surgical care is attended to by a similarly qualified surgeon, Dr. Birkenhagen attested that should there still be indications of post-surgical infection or complication, a similarly qualified surgeon in that community would be expected to examine and/or re-open the patient's surgical site to rule out infection and/or sepsis, especially in the case where Dr. Hanson's surgical procedure resulted in a tear of David's transverse colon resulting in contaminants in his body cavity. R.pp.437-441.

Dr. Birkenhagen also stated that Dr. Hanson failed to meet the standard of care in the community that was applicable in 2009 and that standard which is applicable to a board certified surgeon and/or member of the American College of Surgeons.

The Affidavit of Dr. Birkenhagen established his care and surgical treatment of Mr. Samples upon transfer from BMH to Portneuf on or about October 4, 2009, and that he reviewed the records at that time of David's care at BMH.

Dr. Birkenhagen notes David was transferred by Defendants for a "pulmonary consult" indicating their ongoing unawareness that David suffered from severe infection and sepsis. He also notes that the antibiotic regimen prescribed by Defendants were "inadequate to combat the obvious risk of infection" arising from the surgery and torn colon. R.pp.440.

On December 4, 2013, and in response to the Affidavit of Dr. Birkenhagen, the Defendants filed the Affidavit of Ray W. Hanson, M.D. R.pp.544-545. Dr. Hanson's Affidavit indicates that he was not board certified after 2008 "because I was anticipating retirement within the subsequent decade". The purpose of Dr. Hanson's Affidavit appears to be to establish that since he was on the way to retirement, he was not required to adhere to the standards of care required of him as a board certified surgeon until his certification expired in 2008.

On January 3, 2014, the District Court issued a Decision on Motions for Summary Judgment striking the Plaintiffs' Expert Witness, Dr. Birkenhagen, finding that "Plaintiffs have not laid the proper foundation for their expert witness testimony regarding the local standard of care and Defendants are entitled to Summary Judgment in their favor." R.pp.606-622

The Court entered Judgment consistent with its Memorandum Decision on January 6, 2014. R.pp.623-624.

The Plaintiffs timely appealed by Notice of Appeal filed February 11, 2014. R.pp.625-8. Plaintiffs filed an Amended Notice of Appeal on July 11, 2014. R.pp.658-663.

III. ARGUMENT

A. Standard of Review

"On appeal from the grant of a Motion for Summary Judgment, this Court utilizes the same standard of review used by the District Court originally ruling on the Motion." Arregui v. Gallegos-Main, 153 Idaho 801, 804, 291 P.3d 1000, 1003 (2012); see also Mattox v. Life Care Centers of America, Inc., 2014 WL 5463358, Slip Opinion No. 40762, Oct. 29, 2014.

Summary Judgment is only proper when "the pleadings, depositions and admissions on file together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c)(2014).

"The admissibility of expert testimony, however, is a threshold matter that is distinct from whether the testimony raises genuine issues and material fact sufficient to preclude summary judgment.....The trial court must look at the witness' affidavit or deposition testimony and determine whether it alleges facts which, if taken as true, would render the testimony of that witness admissible." Dulaney v. St. Alfonses Regional Medical Center, 137 Idaho 160, 163, 45 P.3d 816, 819 (2002).

B. The deposition testimony and Affidavit of Dr. Birkenhagen created a genuine issue of material fact prohibiting Summary Judgment.

The Defendants moved to strike Dr. Birkenhagen's testimony by Motion, Memorandum and Affidavit filed November 7, 2013. In it, Defendants argued that "Dr. Birkenhagen has not taken any steps to familiarize himself with the applicable local standard of care practice in this matter". R.pp.237-238 [Defendants' Memorandum in Support of Motion to Strike Plaintiffs' Proposed Expert Dr. Birkenhagen]

The District Court in its Decision Granting Defendants' Motion noted that the Motion to Strike Dr. Birkenhagen as an expert witness was effectively a Motion to Dismiss the Plaintiffs' case since Dr. Birkenhagen was the only medical expert identified in the expert witness disclosure and the "statute of limitations has run". R.p.614.

The District Court concluded that due to the Court's postponement of the initial November 21st hearing, and based upon the Court's conclusion as to the posture of the case, "the Motion to Strike Dr. Birkenhagen is now a Motion for Summary Judgment for failure of Plaintiffs' Expert to familiarize himself with the local standard of care as experts are required to do in a medical malpractice case". R.p.614.

The District Court then concludes from the deposition testimony of Dr. Birkenhagen "that Birkenhagen did not communicate with anyone at Bingham Memorial Hospital about the relevant standard of care for a surgeon at the hospital in 2009 or about any deviations in the standard in existence in Blackfoot from the standard in Pocatello in 2009." R.p.261.

This finding is inaccurate and misstates the evidence before the Court at the time it ruled upon this Motion.

Plaintiffs' Affidavit in matters of this nature are not required to "include particular phrases or state that the expert acquainted himself or herself with the applicable standard of care in some *formulaic manner* in order to establish adequate foundation under Section 6-1013". Mattox v. Life Care Centers of America, Inc., 2014 WL 5463358, Slip Opinion No. 40762, Oct. 29, 2014.

The Court similarly concluded that the affidavit need merely explain "how he or she became familiar with that standard of care" applicable in the community, referring to the Plaintiffs' medical expert affidavit. Bybee v. Gorman, 157 Idaho 169, ____, 335 P.3d 14, 19 (Sept. 19, 2014).

The Court has upheld plaintiffs' experts who familiarize themselves with a standard of care through a number of means or methods. Bybee v. Gorman, 157 Idaho 169, 178-9, 335 P.3d 14, 23-24 (2014)[Court erred by excluding expert's affidavit because the out of area expert learned the standard of care through consultation with an anonymous local expert.] Newberry v. Martens, 142 Idaho 284, 292, 127 P.3d 187, 195 (2005) [holding an *ophthalmologist* could familiarize himself with the standard of care for *family practice physicians* by "practicing alongside" and providing and obtaining referrals, and discussing patient care, even if he never explicitly asked about the standard of care]; Grover v. Smith, 137 Idaho 247, 253, 46 P.3d 1105, 1111 (2002)[holding an out of area dentist had knowledge of the applicable standard of care by demonstrating familiarity with state licensing requirements.]

In Mattox, the Court stated:

> The guiding question is simply whether the affidavit alleges facts which, taken as true, show the proposed expert has actual knowledge of the applicable standard of care. In addressing that question, courts must look to the standard of care at issue, the proposed expert's grounds for claiming knowledge of that standard, and determine – *employing a measure of common sense* – whether those grounds would likely give rise to knowledge of that standard.
>
> Mattox v. Life Care Centers of America, Inc.,
> 2014 WL 5463358, Slip Opinion No. 40762, Oct. 29, 2014
> [emphasis added]

The evidence before the Court established Dr. Birkenhagen's familiarity with the standard of care:

First, Dr. Birkenhagen replaced Dr. Ray Hanson as surgeon employed by BMH in August 2011, with privileges granted three (3) to four (4) months earlier. R.p.438. There can be no

question that as of April, 2011, Dr. Birkenhagen was well familiar with the standard of care as a surgeon with privileges at Bingham Memorial Hospital.

Second, Dr. Birkenhagen states that "the minimum standard of care in Blackfoot at Bingham Memorial Hospital was no different in 2009 than when I arrived in 2011, based upon my review of my immediate predecessor, Dr. Ray W. Hanson's qualifications and the standards expected of a similarly qualified surgeon". R.p.438. In this regard Dr. Birkenhagen states with clarity that his review of Dr. Hanson's qualifications and the standards expected of a similarly qualified surgeon caused Dr. Birkenhagen to be familiar with the standard of care in Blackfoot, Idaho, at Bingham Memorial Hospital in 2009 as being the same as that which existed in 2011 when Dr. Birkenhagen replaced Dr. Hanson.

This fact is confirmed by Dr. Birkenhagen's assessment that Dr. Hanson was holding himself out as a general surgeon, previously board certified and previous member of the American College of Surgeons.

Third, the Affidavit of Dr. Birkenhagen establishes that he made himself familiar with the standard of care upon his arrival by reviewing the care provided at Bingham Memorial Hospital in 2011 by his predecessor and the Defendant in this action, Ray Hanson, together with a comparison of that to the care and treatment of the Plaintiff, David Samples.

Fourth, the Defendants and District Court overlooked a significant portion of Dr. Birkenhagen's deposition testimony as follows:

> Q. Have you ever spoken with anyone who was a practicing surgeon at Bingham Memorial Hospital in September of 2009, about the standard of care for general surgeons at Bingham Memorial hospital in September of 2009?

A. If you are asking me have I ever said what is the standard of care, the answer is no. But I have talked to Anthony Davis about how things should be done, are done, would be done at Bingham.

Q. Ok.

A. But did we discuss a specific of care about a specific thing, I don't recall.

R.p.251

In Newberry v. Martens, Plaintiffs' expert was an ophthalmologist that practiced in Twin Falls and asserted a familiarity with the standard of care for family physicians by practicing alongside family physicians, but had not ever "*explicitly asked* a family practice physician what the standard of care was in Twin Falls". Newberry v. Martens, 142 Idaho 284, 292, 127 P.3d 187, 195 (2005)

The Supreme Court noted that qualification to testify as Plaintiffs' expert "does not dictate that such actual knowledge must in all cases be obtained by explicitly asking a specialist in the relevant field to explain the local standard of care." Id.

Likewise, Dr. Birkenhagen testified that he was familiar with the standard of care through all of the factors above, as well as his discussions with local surgeon, Anthony Davis, about "how things should be done, are done, and would be done at Bingham". R.p. 251.

It was improper for the District Court to grant Summary Judgment in this matter since Dr. Birkenhagen's testimony, both in affidavit and deposition, establishes his familiarity with the standard of care.

For the reasons set forth above, this Court should reverse the District Court's Summary Judgment and remand for new trial.

C. The District Court erred in its Conclusion that Dr. Birkenhagen is an "out-of-area expert" because he practiced at Portneuf in September, 2009.

The District Court concluded that because Dr. Birkenhagen worked in Pocatello until 2011, when he was hired by Defendants to replace the Defendant, Ray W. Hanson, and because there is a thirty (30) minute distance between Pocatello and Bingham Memorial Hospital that Dr. Birkenhagen is considered an "out of area" expert who must familiarize himself with the standard of care within the community.

This finding is contrary to recent case law that the "geographical scope of the community is a factual issue" that must be viewed in favor of the Plaintiffs as the non-moving party. Bybee v. Gorman, 157 Idaho 169, ____, 335 P.3d 14, 20 (2014).

In Bybee the Court noted that a threshold matter to the admissibility of an expert's testimony is defined by the community. In Ramos v. Dixon, 144 Idaho 32, 156 P.3d 553 (2007), the Plaintiffs' expert was from out of state but contacted a Dr. Spiers practicing in Idaho Falls, to familiarize himself with the standard of care for Bingham Memorial Hospital. Noting the proximity of Idaho Falls and Pocatello to the subject "community" of Blackfoot, the Court noted that the though each community possesses their own licensed general hospital, this fact does not preclude a finding that Dr. Spiers, in Idaho Falls, could be familiar with the standard of care in Blackfoot. The Court also noted that simply because each community, Idaho Falls, Blackfoot and Pocatello, have their own hospitals: "Hospitals in nearby towns can certainly be in competition with each other". Ramos, 144 Idaho at 35, 156 P.3d at 536. Dr. Spiers concluded that the standard of care did not deviate from Idaho Falls to Blackfoot, or for that matter, statewide.

Similarly, Dr. Birkenhagen testified that based upon all of the factors (practice and privileges at BMH since 2011, discussions with Anthony Davis, review of Dr. Hanson's education and qualifications, and review of David's chart, both from BMH and after taking over his care at Portneuf) that he was familiar with the standard of care at BMH and this it did not differ statewide with regard to the obligation to follow and attend to David post surgery, and that Dr. Hanson breached that standard of care.

The Court in Bybee concludes by noting that the terminology "ordinarily served found in Idaho Code § 6-1012 coupled with the fact that nearby communities may each have individual hospitals may result in overlapping communities for purposes of defining Idaho Code § 6-1012. Bybee v. Gorman, 157 Idaho 169, ___, 335 P.3d 14, 21-22 (2014)[reversing and remanding with explanation that it was error to have stricken the plaintiff's expert's affidavit simply because plaintiff's expert practiced in Pocatello rather than Idaho Falls.]

It is fair to conclude from the holding of Bybee, that a doctor practicing in an immediately adjacent community that overlaps with the subject community (in terms of "ordinarily" serving patients within the community) **is** qualified as an expert on the standard of care, perhaps even with much less investigation required to determine if any deviation in the standard exists between the neighboring communities.

There is ample evidence in the instant case that Dr. Birkenhagen has significant familiarity with the standard of care in the community of Blackfoot as a result of his surgical practice from 1977 until 2011, just minutes away in Pocatello. Dr. Birkenhagen obviously treated patients from Blackfoot and, specifically, referrals or transfers from Bingham Memorial Hospital, such as David. Having initially been treated at Bingham Memorial Hospital on September 29th through October

4th, David was transferred to Portneuf Medical Center for a pulmonary consult after Drs. Hanson and Llinas, both employees of BMH were unable to determine the reason for David's breathing difficulties. R.p.251.

Dr. Birkenhagen was the surgeon on call when Mr. Samples arrived suffering from hypoxemia and acute respiratory failure on the morning of October 4th. R.pp.468-470

Applying the directive from Mattox that District Court's should "employ a measure of common sense" when evaluating the expert's foundation for knowledge of the standard of care, it is apparent that Dr. Birkenhagen was qualified to opine as to the standard of care in 2009 at Bingham Memorial Hospital. Based upon the findings in Bybee, it is apparent that Dr. Birkenhagen was qualified to testify based on factors set forth above (conversations with Dr. Anthony Davis, review of records and qualifications of Dr. Hanson upon his employment and privileges in the Spring and Summer of 2011) and based upon twenty-two (22) years (1977-2009) of practicing general surgery at Portneuf Medical Center just thirty (30) minutes from Bingham Memorial Hospital.

For the reasons set forth above, the District Court erred by entering Summary Judgment and by making a finding that Dr. Birkenhagen was an "out-of-area expert" who had not familiarized himself with the standard of care within the "community" as of 2009.

D. Dr. Birkenhagen should have been permitted to testify at trial regarding a national or statewide standard of care for general surgeons in David's case.

In its Memorandum Decision, the District Court held that "even if the local standard of care was the same as that of a national standard of care in 2009", Dr. Birkenhagen was required to inquire of the local standard in order to ensure that there are no deviations. As indicated above, Dr.

Birkenhagen did inquire of the local standard of care and did familiarize himself to the point of determining no deviation existed.

The District Court erred in concluding that because Dr. Hanson was not board certified at the time of the surgery in October, 2009, therefore a statewide or national standard of care is not applicable. This conclusion seems to suggest that the standard of care will fluctuate simply based upon whether a physician maintains certification or membership with national associations.

The Court should apply "... 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." McDaniel v. Inland Nw. Renal Care Grp.-Idaho, LLC, 144 Idaho 219, 222, 159 P.3d 856, 859(2007)

Idaho Code §6-1013 provides that the standard of care is dictated by the Defendant's training, experience and fields of medical specialization. Once those are established, the bar is set for that provider's standard of care. The simple fact that the Defendant decides to allow a certification to lapse in anticipation of retirement should not result in a lowering of the standard of care within an entire community. To accept this argument is to encourage medical personnel to avoid specialization or decline or avoid board certification or fellowship, so as to avoid being held to a higher standard. The resulting cost in quality of care to the community would be significant.

In a similar circumstance, the Court noted that a defendant acting in both the capacity of Medical Director of the nursing home and as a physician prescribing medication, the Court cannot ignore the qualifications held in one role while carrying out the other:

> The upshot of this testimony is, we believe, that when a medical director is actually treating the patient in the nursing home, in the manner in which Dr. Thurston was treating Delbert in this case,

> any particular act cannot be assigned separately to a particular capacity. As Dr. Luxenberg pointed out, if Dr. Thurston failed in his capacity as medical director, that failure is based on his own failures as a physician prescribing Haldol to a patient in a nursing home. We acknowledge the affidavit of Dr. Frederick Haller, who had served as medical director of a nursing home in another small, rural Idaho community. He said, essentially, that when he was actually treating individual residents, he was acting as a physician and not a medical director. Under the statute, however, we are unable to split those hairs. In judging Dr. Thurston's performance as a physician, we cannot ignore his training and experience as a medical director—the individual charged with supervising patient care.
>
> Hayward v. Jack's Pharmacy Inc., 141 Idaho 622, 627-28, 115 P.3d 713, 718-19 (2005)[holding the Court erred in distinguishing between these roles under I.C.§ 6-1013]

The fact that Dr. Hanson, in anticipation of retirement, elected to allow his surgical board certification to lapse a year before providing negligent care to David Samples should not result in reducing the standard of care in the community at David's (and the general public's) expense. Dr. Hanson is held to the standard of care exhibited by his more than thirty (30) years of practice while maintaining board certification and qualifications from 1977 to 2008.

It was error for the District Court to grant the Defendant's motion for summary judgment. This Court is asked to reverse and remand.

E. Appellant was deprived of the opportunity to depose Dr. Hanson and thereby establish the standard of care in the community.

One of the recognized means by which Plaintiffs' can meet the foundational requirements of establishing the standard of care in the community is by taking the deposition of the Defendants and causing the Plaintiff's Expert to review the deposition as foundation for Plaintiffs' expert's testimony. Suhadolnik v. Pressman, 151 Idaho 110, 254 P.3d 11 (2011).

"In Kozlowski, the plaintiff's expert reviewed the defendant's deposition testimony, wherein the defendant stated that the local standard was equivalent to the national standard and governed by a particular handbook. Because the expert was familiar with the handbook mentioned as embodying the national standard, and was board-certified in the specialty area, the Court held the expert demonstrated sufficient knowledge of the local standard of care." Suhadolnik v. Pressman, 151 Idaho 110, 117, 254 P.3d 11, 18 (2011); citing Kozlowski v. Rush, 121 Idaho 825, 827, 828 P.2d 854, 856, 1992 WL 51279 (1992).

The Plaintiffs requested the opportunity to take the Defendants' and Defendants' experts' deposition testimony from June 14 through early November, 2013, only to then be told the Defendants and their experts were not available until after the holidays and just days prior to the January, 2014 trial schedule. Plaintiff's counsel made every attempt to schedule and conduct the depositions which would have assisted in establishing the relevant standard of care, without response from the Defendants. R.pp.568-589.

As last resort, Plaintiff finally sought leave of the court to reschedule the trial and for relief from the Court's pretrial order and deadlines. R.pp.565-589, pp.452-6 and, pp.254-260.

The District Court denied all motions stating that it would adhere to the Pretrial deadline apparently as a sanction on Plaintiffs, citing that it was an attempt to "circumvent the October 24, 2013 Order" of the District Court.

"A decision of whether to grant or deny a motion for a continuance is vested in the sound discretion of the trial court." Vendelin v. Costco, 140 Idaho 416, 95 P.3d 34 (2004).

Where a party demonstrates prejudice from a denied request for continuance, the Appellate Court will reverse the trial court's discretion. State v. Nunez, 133 Idaho 13, 981 P.2d 738 (1999).

With regard to sanctions for pretrial compliance, the Court has said:

> A trial court has authority to sanction parties for non-compliance with pretrial orders. Sanctions may include those enumerated in I.R.C.P. 37(b)(2)(B), (C) and (D) for discovery violations. I.R.C.P. 16(i). One such authorized sanction is the disallowance of specified evidence. I.R.C.P. 37(b)(2)(B). The imposition of such sanctions is committed to the discretion of the trial court, and we will not overturn such a decision absent a manifest abuse of that discretion. When reviewing a trial court's discretionary decision, we apply a three-part test, examining whether the trial court (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion in a manner consistent with applicable legal standards; and (3) reached its decision through an exercise of reason.
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> Priest v. Landon, 135 Idaho 898, 900, 26 P.3d 1235, 1237, (App. 2001)
> [Court upheld the sanction while criticizing adherence to pretrial orders that reward defendants "stonewalling" in the discovery process]

The tone and tenor of the District Court's Decision on Motions for Summary Judgment indicates a belief that Plaintiffs were attempting to thwart or circumvent the Court's prior order. In fact, the evidence before the Court established that Defendants' ignored or deferred Plaintiff's request to conduct depositions for nearly six (6) months leading up to about sixty (60) days before trial, then advised Plaintiffs that their experts and Drs. Hanson and Llinas (another physician employed by BMH during David's care) were unavailable for depositions until after Christmas, 2013, and just days before the mid-January trial date.

It was and abuse of discretion and error for the Court to deny Plaintiffs motions to continue trial and for relief from the pretrial order. The Court is asked to reverse and remand this matter for trial.

F. Appellant Is Entitled To Attorneys' Fees And Costs On Appeal.

Idaho Code § 12-121 permits the award of fees and costs to a prevailing party on appeal where the action is brought or pursued frivolously, unreasonably or without foundation. Idaho Code § 12-121 (2014).

To the extent permitted by the Idaho Appellate Rules and, specifically, Rules 40 and 41, Appellant Jacobson requests an award of attorneys' fees and costs.

IV. CONCLUSION

This Court is asked to reverse the Trial Court's grant of Summary Judgment and remand for trial. The Appellants should be awarded fees and costs on appeal.

DATED this 25th day of November, 2014.

FEATHERSTON LAW FIRM, CHTD.

By: _____
BRENT C. FEATHERSTON
Attorney for Appellants

CERTIFICATE OF MAILING

I hereby certify that on the 25th day of November, 2014, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

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