STATE OF IDAHO)
County of KOOTENAI) ss
FILED 10/28/19
AT 1:40 O'Clock P M
CLERK, DISTRICT COURT
Deputy

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

STEVE BRIGGS and TERESA BRIGGS, husband and wife,

Plaintiffs,

VS.

LHCG XXI, LLC d/b/a NORTH IDAHO HOME HEALTH and/or NORTH IDAHO HOME HEALTH-COEUR D'ALENE, IDAHO HEALTH CARE GROUP, INC., JENNIFER O'MALLEY, DEIDRE CLEMENTS, BARBAR KIRKPATRICK and DOES 1-10,

Defendants.

Case No. **CV28-18-7096**

MEMORANDUM DECISION AND ORDER: 1) DENYING DEFENDANTS' MOTION IN LIMINE; 2) GRANTING PLAINTIFFS' MOTION TO AMEND COMPLAINT TO ADD CLAIM FOR PUNITIVE DAMAGES; and 3) GRANTING PLAINTIFFS' MOTION TO SUBMIT THE ISSUE OF WILLFUL AND RECKLESS MISCONDUCT TO THE JURY

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On September 5, 2018, plaintiffs Steve Briggs and Teresa Briggs (Briggs) filed their Complaint and Demand for Jury Trial, claiming that defendant LHCG, XXI, LLC, doing business as defendant North Idaho Home Health (NIHH)[1] and its employees, defendant Jennifer O'Malley, R.N., defendant Deidre Clements, R.N., defendant Barbara Kirkpatrick, R.N. and other employees of NIHH, were negligent in their care of Steve Briggs. Complaint 11, ¶ 46. Steve Briggs (Steve) is 61, has multiple sclerosis and functional quadriplegia and was wheel chair bound. *Id.* at 4, ¶ 12. Steve was hospitalized

[1] Defendants, and at times plaintiffs refer to LHC Group in their briefing. For purposes of this decision, the defendants collectively are referred to as NIHH.

at Kootenai Health from August 10-16, 2016, and then North Idaho Advance Care Hospital, and was then discharged with a recommendation that he obtain wound care from a home health agency for pressure ulcers that had developed during his hospitalization. *Id.* The Briggs contacted NIHH to see if it could provide such care, and on September 9, 2016, NIHH conducted an assessment of Steve. *Id.* at 4-5, ¶ 13. The next day, September 10, 2016, NIHH developed a Home Health Certification and Plan of Care for care beginning that day. *Id.* at ¶ 14. NIHH charged the Briggs $950.00 for the assessment and $300 per visit at a frequency of three visits per week beginning September 10, 2016, and ending December 5, 2016, for a total of 39 visits. *Id.* at 5-6, ¶ 16. The Briggs claim while being cared for by NIHH, Steve developed four new pressure injuries and some of the previously assessed pressure injuries assessed by NIHH worsened. *Id.* at 6, ¶ 17. The Briggs claim that NIHH inconsistently documented Steve's injuries, failed to assess his injuries and failed to communicate with Dr. David Chambers, M.D. *Id.* at ¶¶ 18-21. The Briggs claim NIHH and its employees O'Malley, Clements and Kirkpatrick were negligent. *Id.* 10-25. The Briggs claim NIHH breached their contract with the Briggs. *Id.* at 25-28. The Briggs claim NIHH has negligently inflicted emotional distress upon Teresa Briggs. *Id.* at 28-29. Teresa Briggs claims loss of consortium due to defendants' actions. *Id.* at 32. The Briggs claim imputed and vicarious liability of LHCG XXI, LLC for the actions of NIHH and its employees. *Id.* at 29-32.

On October 12, 2018, NIHH filed their Answer and Demand for a Jury Trial. On December 18, 2018, this Court scheduled this case for a five-day jury trial to begin August 12, 2019. On January 16, 2019, the parties stipulated to vacate that trial date and begin the trial on April 20, 2020. The Court signed an order to that effect the next day.

On August 9, 2019, the Briggs filed their Motion to Amend to Add a Claim for

Punitive Damages and to Submit the Issue of Willful and Reckless Misconduct to the Jury, a Memorandum in support of that motion, a Declaration of Demetria Haffenreffer, R.N. and a Declaration of Gary Cooper in support of that motion. A second declaration of Gary Cooper was filed September 4, 2019, and a corrected second declaration was filed September 20, 2019. On September 24, 2019, defendants filed their Memorandum in Opposition to Plaintiffs' Motion to Amend to Add a Claim for Punitive Damages and to Submit the Issue of Willful and Reckless Misconduct to the Jury, and Affidavits of Barbara Kirkpatrick, Jennifer O'Malley, Leslee Palmer and Robert Wetherell in support of that opposition. On September 30, 2019, Briggs filed their Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion to Amend to Add a Claim for Punitive Damages and to Submit the Issue of Willful and Reckless Misconduct to the Jury.

On September 18, 2019, NIHH filed Defendants' Motion in Limine to Exclude Health and Welfare's December 2016 Survey and Findings, NIHH's Own Root Cause Analysis and Plaintiffs' Expert, a memorandum in support of that motion and an Affidavit of Robert T. Wetherell in support of that motion. On September 25, 2019, Briggs filed Plaintiffs' Memorandum in Opposition to the Defense Motion in Limine. On October 30, 2019, NIHH filed Defendants' Reply to Plaintiffs' Opposition to Defendants' memorandum in Support of Defendants' Motion in Limine to Exclude Health and Welfare's December 2016 Survey and Findings, NIHH's Own Root Cause Analysis and Plaintiffs' Expert.

On September 24, 2019, NIHH filed Defendants' Motion and Argument to Strike, or in the Alternative, Motion in Limine Re: Plaintiffs' Corrected Second Declaration of Gary L. Cooper in Support of Motion to Amend to Add a Claim for Punitive Damages and to Submit the Issue of Willful and Reckless Misconduct to the Jury. On September 24, 2019, the Briggs filed a Declaration of Gary L. Cooper in Opposition to Defendants' Motion and Argument to Strike, or in the Alternative, Motion in Limine Re: Plaintiffs'

Corrected Second Declaration of Gary L. Cooper in Support of Motion to Amend to Add a Claim for Punitive Damages and to Submit the Issue of Willful and Reckless Misconduct to the Jury.

Oral argument on these motions was held on October 2, 2019. Due to the volume of material filed, the court took the motions under advisement.

II. STANDARD OF REVIEW.

A. NIHH's Motion in Limine.

NIHH's Motion in Limine to Exclude Health and Welfare's December 2016 Survey and Findings, NIHH's Own Root Cause Analysis and Plaintiffs' Expert is essentially a motion to strike, a discovery issue. A district court's decision to impose discovery sanctions is discretionary and will be overturned only where the district court abused its discretion. *Lepper v. E. Idaho Health Servs., Inc.*, 160 Idaho 104, 109, 369 P.3d 882, 887 (2016) (citing *Edmunds v. Kraner*, 142 Idaho 867, 872–73, 136 P3d 338, 343–44 (2006)). Appellate courts apply a four-prong standard for discretionary review: "whether the trial court (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho 856, 867, 421 P.3d 187, 198 (2018).

B. Briggs' Motion to Amend to Add a Claim for Punitive Damages.

> A court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. I.C. § 6–1604. Punitive damages are not favored in the law and should be awarded in only the most unusual and compelling circumstances. *Manning v. Twin Falls Clinic & Hosp.*, 122 Idaho 47, 52, 830 P.2d 1185, 1190 (1992). Idaho Code § 6–1604 provides in pertinent part: "[i]n any action seeking

recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted."

The issue of punitive damages "revolves around whether the plaintiff is able to establish the requisite 'intersection of two factors: a bad act and a bad state of mind.' " *Myers v. Workmen's Auto Ins. Co.,* 140 Idaho 495, 503, 95 P.3d 977, 985 (2004) (citing *Linscott v. Rainier Natl. Life Ins. Co.,* 100 Idaho 854, 858, 606 P.2d 958, 962 (1980)). The action required to support an award of punitive damages is that the defendant "acted in a manner that was 'an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences.' " *Id.* at 502, 95 P.3d at 984 (citing *Cheney v. Palos Verdes Inv. Corp.,* 104 Idaho 897, 905, 665 P.2d 661, 669 (1983)). The mental state required to support an award of punitive damages is " 'an extremely harmful state of mind, whether that be termed malice, oppression, fraud or gross negligence; malice, oppression, wantonness; or simply deliberate or willful.' " *Id.* Therefore, to support an award of punitive damages, Appellants must prove North Pacific's actions towards Jennings constituted an extreme deviation from standards of reasonable conduct, which was done with knowledge of the likely consequences and an extremely harmful state of mind.

A district court's determination that a plaintiff is not entitled to amend the complaint to claim punitive damages is reviewed for abuse of discretion. *Weaver v. Stafford,* 134 Idaho 691, 700, 8 P.3d 1234, 1243 (2000).

Seineiger Law Office, P. A. v. North Pacific Ins. Co., 145 Idaho 241, 249-50, 178 P.3d 606, 614-15 (2008). The abuse of discretion standard is set forth immediately above.

III. ANALYSIS

A. NIHH's Motion in Limine to Exclude Health and Welfare's December 2016 Survey and Findings, NIHH's Own Root Cause Analysis and Plaintiffs' Expert.

1. Health and Welfare's December 2016 Survey and Findings.

NIHH claims that as part of Briggs' proof, Briggs has presented a Health and Welfare Survey, and a Root Cause analysis prepared by NIHH. Mem. in Supp. of Defs,' Mot. in Lim. To Exclude Health and Welfare's December 2016 Survey and Findings, NIHH's Own Root Cause Analysis and Pls.' Expert, 2. NIHH argues the

Health and Welfare Survey is hearsay under Idaho Rule of Evidence (I.R.E.) 802, that it is not a public record exception to the hearsay rule under I.R.E. 803(8), that it is a subsequent remedial measure and should be excluded under I.R.E. 407, and that it will likely confuse the issues and mislead the jury under I.R.E. 403. *Id.* at 2-8. NIHH claims the Briggs' out-of-state expert, Demetria Haffenreffer, does not know the local standard of care for home health nurses of for a Home Health Agency in Coeur d'Alene, Idaho, and thus, her declaration should be excluded. *Id.* at 2-16.

NIHH argues, "The report [Health and Welfare's December 2016 Survey and Findings] is an out of court written assertion (statement) being made by an unkown declarant, and is being presented by the Plaintiffs to prove the truth of the matter asserted by the document. This is the pinnacle of hearsay and to allow it into evidence would deny the Defendants their right to confront their accuser." *Id.* at 3. This argument was made on more than one occasion at oral argument on October 2, 2019. Aside from this not being a criminal trial, being able to confront one's accuser does little to answer the questions as to a) whether this report is hearsay, and if so, whether an exception applies, or b) whether the report is not hearsay.

As to the Health and Welfare Survey, the Briggs claim:

> There are four specific documents which were generated by IDHW for CMS and the Bureau of Facility Standards, which the defense seeks to exclude because it claims the records are not "public records" and do not fall within the hearsay exception found in IRE 803(8). These documents are attached to the Cooper Declaration as Exhibits 5, 6, 7 and 8, collectively the "agency documents," and have been the subject of extensive questioning during the depositions of the NIHH administrator, Barbara Kirkpatrick, and the LHC Group 30(b)(6) witness Leslee Palmer. In fact, contrary to the assertions of the defense, the agency documents are all public records available to the public by accessing the IDHW website. In addition, both Kirkpatrick and Palmer testified that the agency documents were factually correct and the deficiencies and violations cited in those agency documents were accepted as true by LHC Group. These four documents are identified as follows:
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> 1. The cover letter dated January 18, 2017 notifying the NIHH

administrator that the home health agency was out of compliance with the Medicare Home Health Agency Conditions of Participation. The defense claims this is not a public record. It is a public record and is available on the Idaho Department of Health and Welfare website at http://healthandwelfare.idaho.gov/Medical/Licensing Certification/FacilityStandards/HHASurvevResults/tabid/1644/ Default.aspx#I. This letter notified NIHH that it could either question the deficiencies or submit a plan of correction. LHC Group, which operates NIHH, chose to accept the findings of deficiencies and make corrections:

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10 Q. So, in essence, and as a matter of fact, you
11 as the director of nursing and LHC Group accepted those
12 findings of deficiencies?
13 A. Yes.
14 Q. And chose to make corrections?
15 A. Yes.

Barbara Kirkpatrick Deposition.

2. The fifty-seven (57) page CMS Statement of Deficiencies and Plan of Correction signed by Barbara Kirkpatrick, the LHC Group Director 0f Nurses at NIHH. This 57 page document is also available to the public at: http://healthandwelfare.idaho.gov/Medical /LicensingCertification/FacilityStandards/HH ASurvevResults/tabid/ 1644/Default.aspx#I. Of the four documents at issue, this is probably the most important because it details the deficiencies found by the surveyors which violated the regulatory requirements found in Title 42, Part 484 Code of Federal Regulations. It establishes that the deficient care provided to Briggs was not an isolated incident, but rather was part of "systemic failures" which "seriously impeded" the ability of NIHH to provide "services of sufficient scope and quality." (See Cooper Declaration, Exhibit 7, aka Deposition Exhibit 144B at page 4/57).

3. The five (5) page Idaho Bureau of Facility Standards Statement of Deficiencies and Plan of Correction signed by Barbara Kirkpatrick, the LHC Group Director of Nurses at NIHH. This five page document is also available to the public at: http:// healthandwelfare.idaho.gov/Medical/LicensingCertification/FacilityS tandards/HH ASurvevResults/tabid/ 1644/Default.aspx#I. This document details the deficiencies found by the surveyors which violated the rules found in IDAPA 16.03.07 which are imposed by the State of Idaho as part of its licensure of home health agencies. These rules are substantially similar to the regulations imposed by Title 42, Chapter 484 Code of Federal Regulations. There is significant duplication, but the deficiencies based on violations of IDAPA also included violations of LHC Group's own policies which it had adopted to insure that client's care met minimum standards.

4. The January 26, 2017 letter which contains the findings regarding the complaint about the lack of care provided to Briggs and which notified the NIHH administrator that the home health

> agency had not provided appropriate care and treatment to Briggs. of the four documents at issue, this is probably the second most important because it details the deficiencies found specifically dealing with the neglect of Briggs. It is "second most important" only because its findings are also included in the 57 page CMS Statement of Deficiencies and Plan of Correction. Because the CMS Statement of Deficiencies and Plan of Correction requires some orientation to understand, this letter is more user-friendly and from it one can better understand the numerous significant failures by LHC Group to adhere to the regulations which govern how services are to be provided to clients like Steve Briggs. This document is also available to the public at: http:// healthandwelfare.idaho.gov/Medical/LicensingCertification/FacilityStandards/HH ASurvevResults/tabid/1644/Default.aspx#I.

Pls.' Memo. In Opp. to Defense Mot. in Lim. 3-6 (footnotes omitted). Briggs argue that it is not the "public record" exception to the hearsay rule found in I.R.E. 803(8) that applies to the report, but rather that the report is not hearsay in the first place, under the adoptive admission rule found in I.R.E. 801(d)(2)(B), which reads: "(d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay: * * * (2) Statement by Party-Opponent. The statement is offered against an opposing party and: * * * (B) is one the party manifested that it adopted or believed to be true." *Id.* at 7. Briggs argues, "The agency documents are adoptive admissions because Barbara Kirkpatrick, the NIHH administrator, and the LHC Group 30(b)(6) witness, Leslee Palmer, have both testified that these documents contain accurate factual findings and LHC Group considered the findings and deficiencies to be substantiated by the facts:" *Id.* Briggs then set forth the portions of the transcripts of the depositions of Kirpatrick and Palmer which support that claim. *Id.* at 7-10. Briggs then correctly notes that in *State v. Moses*, 156 Idaho 855, 865, 332 P.3d 767, 777 (2014), the Idaho Supreme Court held there are two requirements for an adoptive admission: the adoptive admission is "'offered against a party' and is 'a statement of which the party has manifested an adoption or belief in its truth.'" *Id.* at 10, citing *Moses*. Briggs then

notes that in a civil case, the adoptive admissions rule was explained in *Pilgrim v. Trustees of Tufts Coll.*, 118 F.3d 864, 870 (1st Cir. 1997), and that such analysis was used in *O'Neal v. Mumford*, 2013 Ida. Dist. LEXIS 13. *Id.* This Court has reviewed *Moses*, *Pilgrim* and *O'Neal*, and agrees with Briggs that Briggs has shown that the Health and Welfare Survey was offered against the LHC Group and that LHC Group manifested an adoption or belief in the truth of the findings contained therein, because LHC Group accepted the findings contained in those agency documents when a representative of LHC Group signed the documents and then LHC made a determination not to contest the findings contained in those agency documents and implemented corrective action to preserve its licensing without disclaimer or objection. *Id.* at 11.

NIHH next argues the probative value of the Health and Welfare Survey is outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasting time or presentation of cumulative evidence under I.R.E. 403. Mem. in Supp. of Defs,' Mot. in Lim. to Exclude Health and Welfare's December 2016 Survey and Findings, NIHH's Own Root Cause Analysis and Pls.' Expert, 7-8. NIHH's argument is that "because the Survey makes a finding that Nurse O'Malley's conduct amounted to neglect under medicare guidelines", "neglect does not in and of itself equate to negligence." *Id.* at 7. While neglect and negligence are not necessarily the same, neglect certainly can be negligent and can be *evidence* of negligence. NIHH then argues:

> To allow a state/national survey with a finding of neglect in front of a jury will likely cause that jury to view a finding of neglect as a finding of negligence. To allow a factual finding such as this into evidence will invade the providence of the jury who are the ultimate fact finders in this case. Just because a home health agency is out of compliance with Medicaid and Medicare participation requirements does not mean that the

> same agency or its nurses were negligent. This prejudices the Defendants because the defense cannot refute these state/national agency's findings of neglect. Because of this the jury may believe the defense cannot refute the Plaintiffs' chief claim of negligence. This would turn the entire case into nothing more than a damages calculation action and the rubber stamping of the finding of a government agency.
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> Because of this the court should exclude the Health and Welfare survey.

Id. at 7-8. No legal citation is given by defendants to this argument. Defendants' piteous cry ignores some fundamental precepts of the laws of evidence. One of the purposes of Idaho Rule of Evidence 403 is to prevent *unfair* prejudice. Evidence that is damaging to a party is always prejudicial to that party. However, that does not mean that just because the evidence is damaging, it is inadmissible for that reason. If that were the case, no evidence would be admissible as nearly all relevant evidence is damaging to one side of the litigation or to the other. It is not unfair prejudice just because the evidence sought to be admitted is damaging or prejudicial to the party. Only evidence which is *unfairly* prejudicial to one party which must then be weighed against the probative value of that evidence to the other party who seeks the admission of that evidence. "Evidence is not unfairly prejudicial simply because it is damaging to a defendant's case. Evidence is unfairly prejudicial when it suggests decision on an improper basis. *State v. Pokorney,* 149 Idaho 459, 465, 235 P.3d 409, 415 (Ct. App.2010); *State v. Floyd,* 125 Idaho 651, 654, 873 P.2d 905, 908 (Ct. App.1994)." *State v. Fordyce*, 151 Idaho 868, 870, 264 P.3d 975, 977 (Ct. App. 2011). More recently, as noted by Briggs:

> The Idaho Supreme Court had an opportunity recently to address this IRE 403 issue in *Eller v. Idaho State Police*, 165 Idaho 147, 443 P.3d 161, 177 (2019) where it held:
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> "Rule 403 *does* not offer protection against evidence that is merely prejudicial in the sense of being detrimental to the party's case." *Carlson*, 134 Idaho at 397, 3 P.3d at 75. The concern is whether the evidence gives undue weight, causes illegitimate persuasion, or

> results in inequity. *Davidson v. Beco Corp.*, 114 Idaho 107, 110, 753 P.2d 1253, 1256 (1987).

Pls.' Memo. In Opp. to Defense Mot. in Lim. 13. As Briggs point out, "LHC Group has admitted that O'Malley was guilty of neglect and notified the regulators that O'Malley was terminated because she neglected Briggs. (See Barbara Kirkpatrick's Deposition, pp. 40-41; Leslee Palmer's Deposition, p. 108, L 25-p. 110, L 10). The agency finding of neglect was based on O'Malley's violation of the applicable CFR regulations, the applicable IDAPA rules, and LHC Group's own policies. (See Cooper Declaration, Exhibit 7, aka Deposition Exhibit 144B at pages 2-4/57)." Pls.' Memo. In Opp. to Defense Mot. in Lim. 12. NIHH's argument that the Survey should be excluded by I.R.E. 403 is without merit. The evidence in the Survey does not suggest a decision on an improper basis.

Finally, NIHH argues the Survey should be excluded under I.R.E. 407 as a subsequent remedial measure. Mem. in Supp. of Defs,' Mot. in Lim. To Exclude Health and Welfare's December 2016 Survey and Findings, NIHH's Own Root Cause Analysis and Pls.' Expert, 6-7. NIHH claims, "This is a report that specifically asks for remedial measures and expects remedial measures to be taken. The 2017 survey cannot be used to show any negligent or culpable conduct on the part of any and all Defendants and should be excluded from evidence on those grounds." *Id.* at 7. Again, no legal argument is made by defendants on this point. The most concise argument by Briggs is actually found in a footnote:

> This document also identifies "corrective actions" which LHC Group promised the regulators would be taken to prevent the kind of neglect Briggs and others suffered in the future. The defense characterizes these as "remedial measures." The "remedial measures" identified by LHC Group in this document do not amount to "subsequent remedial measures" that are addressed in IRE 407 because the actions taken were performed pursuant to a regulatory obligation and were not therefore "voluntary"[.] *State v. Elementis Chem, Inc.*, 152 N.H. 794, 801, 887 A.2d

> 1133, 1139-40 (2005) (When a person remedies a hazardous condition pursuant to a statutory obligation, the remediation is not voluntary; the fairness concerns underlying Rule 407 do not require exclusion of involuntary acts of remediation).

Pls.' Memo. In Opp. to Defense Mot. in Lim. 4, n. 9. Briggs then fleshes that argument out. Briggs notes: "The Statements of Deficiencies/Plans of Correction [in the Survey] have two parts: (1) a statement of the applicable federal or state regulation or rule which was violated and the factual basis found during the investigation which supports the alleged violations; and (2) LHC Group's plan to correct the deficiencies." *Id.* at 13-14. Briggs then correctly notes:

> The policy behind IRE 407 is to encourage fixing hazardous conditions and has nothing to do with shielding investigations as to the cause of an injury. Federal judge David Nye explained in *Williams v. Madison Cty., Idaho*, No. 4:12-CV-00561-DCN, 2019 WL 4007217, at *4 (D. Idaho Aug. 23, 2019): "'Rule 407 is based on the policy of encouraging potential defendants to remedy hazardous conditions without fear that their actions will be used as evidence against them.' *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 888 (9th Cir. 1991)." But, because LHC Group and NIHH were forced to take immediate action to "remedy hazardous conditions" or face exclusion by both CMS and the IDHW, any actions taken by LHC Group and/or NIHH to remedy the hazardous conditions were not "voluntary" and therefore not covered by Rule 407:
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> > The majority of Circuits agree that a subsequent remedial measure is not "voluntary" if it is not done by the defendants. See *Steele, Texas Emp. Ins. Ass'n, Intervenor v. Wiedemann Mach. Co,*, 280 F.2d 380, 382 (3d Cir. 1960) (holding the rule excluding evidence of repairs made after an accident is not applicable where the person who made the repairs is not a party to the suit); *TLT—Babcock, Inc. v. Emerson Elec. Co.*, 33 F.3d 397, 400 (4th Cir.1994) ("In the case at bar, the remedial measures were not taken by defendant Emerson but rather were initiated by a third party, the Maryland Transit Authority. Under our reading of *Rule 407*, we conclude that the district court correctly admitted the disputed evidence."); *Lolie v. Ohio Brass Co.*, 502 F.2d 741, 744 (7th Cir. I974)(Rule 407 has no applicability" when the evidence is offered against a party...which did not make the changes"); *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1204 (8th Cir. I990) ("An exception to *Rule 407* is recognized for evidence of remedial action mandated by superior governmental authority or undertaken by a third party because the policy goal of encouraging remediation would not necessarily be furthered by exclusion of such

evidence."); *In re Aircrash in Bali, Indonesia*, 871 F.2d 812, 817 (9th Cir. I989) (per curiam) ("The purpose of *Rule 407* is not implicated in cases involving subsequent measures in which the defendant did not voluntarily participate."); *Mehojah v. Drummond*, 56 F.3d 1213, 1215 (I0th Cir.1995) ("'*[R]ule 407* only applies to a *defendant's voluntary* actions;' it does not apply to fn 54 subsequent remedial measures by non-defendants." (citation omitted) (emphasis in origina1)); *Millennium Partners, LP. v. Colmar Storage, LLC*, 494 F.3d 1293, 1302 (11th Cir. 2007)("*Rule 407* does not apply to a remedial measure that was taken without the *voluntary* participation of the defendant.").[17]

The Idaho cases which have dealt with subsequent remedial measures have identified remedial action, not investigations, as the focus of IRE 407. *Jones v. Crawforth*, 147 Idaho 11, 20, 205 P.3d 660, 669 (2009) (revised protocol regarding the duties of autotransfusionists in the operating room is a subsequent remedial measure); *Watson v. Navistar Int'l Tramp. Corp.*, 121 Idaho 643, 663, 827 P.2d 656, 676 (1992) (changing the auger cover from four inches to 1.3 inches and making certain graphical changes in the combine's warning stickers are subsequent remedial measures); *Leliefezd v. Johnson*, 104 Idaho 357, 364, 659 P.2d 111, 118 (1983)" (Idaho adheres to the general rule that evidence of post-accident repairs or alterations to show antecedent negligence is inadmissible). The investigation and the findings from the investigation are not subsequent remedial measures under the plain meaning of IRE 407.

* * *

Educating and training employees on existing policies is not a "subsequent remedial" measure under IRE 407 because the policies were in existence before Briggs was a patient and before LHC Group and its employees neglected and failed to provide care and treatment for Briggs' wounds. In *Cusack v. Bendpak, Inc.*, No. 4: 17-CV-00003-DCN, 2018 WL 1768030, at *3 (D. Idaho Apr. 12, 2018), federal judge David Nye quoted from an earlier decision When explaining that to be a "subsequent remedial measure" the action had to occur "***after Plaintiff's accident***" and warnings or instructions implemented "approximately two years before Plaintiff's accident" were not protected from admission into evidence by FRE 407. Requiring employees to become familiar with policies and procedures that were in place before the conduct at issue in this litigation does not qualify as a "subsequent remedial measure." The LHC Group employees were supposed to be familiar with the policies and procedures before they undertook to provide skilled nursing services to clients.

Pls.' Memo. In Opp. to Defense Mot. in Lim. 14-17 (emphasis in original). This Court finds I.R.E. 407 is not implicated by Health and Welfare's December 2016 Survey and Findings.

This Court finds all the reasons set forth by NIHH in their motion in limine to exclude the Health and Welfare's December 2016 Survey and Findings are without merit. Accordingly, NIHH's Motion in Limine to Exclude Health and Welfare's December 2016 Survey and Findings is denied.

2. NIHH's Own Root Cause Analysis

NIHH claims NIHH's own Root Cause Analysis is a subsequent remedial measure and should be excluded under I.R.E. 407. Mem. in Supp. of Defs,' Mot. in Lim. To Exclude Health and Welfare's December 2016 Survey and Findings, NIHH's Own Root Cause Analysis and Pls.' Expert, at 8-9. No legal precedent is given by NIHH for that argument.

As to NIHH's own Root Cause Analysis, Briggs claim:

> In addition to the agency investigations LHC Group performed its own investigation and its findings and conclusions were formalized in a document called a "root cause analysis." (See Cooper Declaration, Exhibit 11, aka Deposition Exhibit 178). LHC Group management was involved in this investigation and preparation of the root cause analysis. LHC Group concluded that the neglect of Briggs was caused because Nurse O'Malley was unable to manage her caseload and nurses Kirkpatrick and Clements failed to monitor the accuracy of O'Malley's documentation and failed to monitor O'Malley's caseload.

Pls.' Memo. In Opp. to Defense Mot. in Lim. 6. Briggs also argues, "The Root Cause Analysis ("RCA") which was conducted by LHC Group has two parts, (1) the investigation (i.e. what happened and why did it happen); and (2) the action plan (i.e. what action should be taken in response to the investigation findings)." *Id.* at 14. The Briggs continue:

> The case law does not support the defense argument [that NIHH's own investigation and findings are subsequent remedial measures]. *M.T. v. City of New York*, 325 F. Supp. 3d 487, 498 (S.D.N.Y. 2018) (post-event investigation is not a subsequent remedial measure precluded by the Federal Rules of Evidence 407); *City of Bethel v. Peters*, 97 P.3d 822, 827 (Alaska 2004) (The language of Rule 407 and the general presumption of admissibility laid down by Rule 402, along with persuasive

> authority from other courts, compel us to hold that evidence of post-accident investigations and recommendations are not automatically excluded as subsequent remedial measures).

Id. at n.16. This Court has read *M.T. v. City of New York*. In that case, the plaintiff sued the City of New York and the company that managed its correctional facility, due to her being raped by the city's correction officer. 325 F.Supp.3d at 490. After the rape, the City, through its department of correction, hired the Moss Group to prepare a report, referred to in that litigation as the Moss Report. 325 F.Supp.3d at 492. The Federal District Court Judge in that case held:

> As to the third argument, the City is incorrect that a post-event investigation is a subsequent remedial measure precluded by the Federal Rules of Evidence. *See* 2 Weinstein's Federal Evidence § 407.06[1] (2018) ("Post-Event Investigations") ("Post-event tests or reports are generally outside the scope of Rule 407, and thus admissible, on the basis that they are conducted or prepared for the purpose of investigating the cause of the accident, and can rarely be characterized as 'measures' which, if conducted previously, would have reduced the likelihood of the accident. It is only if changes are implemented as a result of the tests that the goal of added safety is furthered; and, even then, it is only evidence of those changes that is precluded by the rule."); *see also Westmoreland v. CBS Inc.*, 601 F.Supp. 66, 67-68 (S.D.N.Y. 1984).
>
> Accordingly, the Moss Report is properly considered by the Court on this motion.

325 F.Supp.3d at 498 (footnote omitted).

This Court has also read *Peters*. In *City of Bethel v. Peters*, the plaintiff Catherine Peters fell in the shower area of the city-owned senior center. 97 P.3d 822, 824. The city's director of senior services (Louise Charles) prepared an accident investigation report which recommended the installation of safety bars in the shower area which were subsequently installed. *Id.* Peters was awarded $575,000 by a jury and the city was found to be 87% at fault. *Id.* The report was admitted in evidence at the trial. *Id.* The Alaska Supreme Court affirmed the trial court's decision to admit the report, and not admit evidence of the actual subsequent remedial remedy, the actual

installation of shower bars. In a well-reasoned decision, the Alaska Supreme Court wrote:

> Evidence showing that the City followed Charles's recommendation and installed the safety bars is plainly barred by the rule. The City initially argues that the recommendation for safety bars in the report is this type of evidence and claims that the report "reveals the actual safety improvement later installed." But the redacted report only indicated that Charles suggested more safety bars. It did not reveal to the jury that the City followed her advice, and therefore was not excludable as evidence of the installation of the safety bars. Rule 407 excludes the challenged section of the report only if the recommendations themselves are covered by the rule.
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> Our previous cases applying this rule have concerned concrete fixes like placing barriers and flashing lights around a hole where an employee had been injured or salting and sanding an allegedly icy walkway after someone had fallen; we have never considered whether Rule 407 reaches a section of a post-accident report containing an investigation into an accident's causes or a recommendation for an improvement. Many courts applying analogous rules of evidence have held that the rule's scope is limited to improvements actually implemented.[9] [[9]*E.g., McFarlane v. Caterpillar, Inc.*, 974 F.2d 176, 181–82 (D.C.Cir.1992); *Prentiss & Carlisle Co. v. Koehring–Waterous Div. of Timberjack, Inc.*, 972 F.2d 6, 9–10 (1st Cir.1992); *Benitez–Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 33 (1st Cir.1988); *Rocky Mountain Helicopters,* 805 F.2d at 918; *Westmoreland v. CBS Inc.*, 601 F.Supp. 66, 67–68 (S.D.N.Y.1984); *Fox v. Kramer,* 22 Cal.4th 531, 93 Cal.Rptr.2d 497, 994 P.2d 343, 350–53 (2000).] These courts rely in part on the rule's phrase "measures are taken," reasoning that "[r]emedial measures are those *actions* taken to remedy any flaws or failures." Under this reasoning, an investigation or recommendation is not a concrete action; a report on these activities "by itself ... 'would' not 'have made the event less likely to occur.'" These courts therefore do not exclude reports of post-accident investigations and recommendations, often among "the best and most accurate sources of evidence and information" for injured parties.
>
> Other courts disagree, holding that evidence of the parts of a report detailing investigatory findings and recommendations should be excluded as subsequent remedial measures.[13] [[13]*E.g., Maddox v. City of Los Angeles,* 792 F.2d 1408, 1417 (9th Cir.1986); *Martel v. Mass. Bay Transp. Auth.*, 403 Mass. 1, 525 N.E.2d 662, 664 (1988).] These latter courts rely on the sensible proposition that in many cases, "the investigation is the prerequisite to any remedial safety measure." They reason that admitting such post-accident evidence would discourage defendants from carefully investigating accidents and considering how to prevent them in the future; they would then be less equipped to make the safety improvements the rule is designed to promote. This broader interpretation of the rule's

exclusionary scope may advance its goals, but it collides with another evidentiary policy, the principle of wide admission of relevant evidence, and with the language of the rule.

Under Rule 402, our "Rules of Evidence start from the proposition that all relevant evidence is admissible." Rules of exclusion like the one we consider today are merely exceptions to this general rule. Post-accident investigations and recommendations are often relevant to the issue of negligence and, by revealing facts about the causes of an accident and the defendant's concerns about it, may be particularly useful to factfinders.[17] [[17]*See Westmoreland [v. CBS, Inc.],* 601 F.Supp. [66] at 68 [S.D.N.Y. 1984].] The general presumption in favor of admissibility strongly suggests, therefore, that such evidence should be admitted, despite any possible disincentive to safety improvements.

Between these two competing policies, the language of the rule favors admissibility. Rule 407 prohibits evidence of "measures" that have been "taken." We take "measures" to mean concrete actions, and to leave outside the rule's prohibition preliminary investigations and recommendations pointing toward those actions.[18] [[18]*See Rocky Mountain Helicopters,* 805 F.2d at 918; *Fasanaro v. Mooney Aircraft Corp.,* 687 F.Supp. 482, 487 (N.D.Cal.1988); Weinstein & Berger, *supra* note 10, § 407.06[1], at 407–27 to 407–28.] Even if post-accident investigations and reports were considered "measures," the rule would not reach them. The rule excludes "subsequent measures" that would have reduced the likelihood of the accident if they had been "taken previously," meaning before the accident. "One cannot investigate an accident before it occurs, so an investigation and report ... cannot be a measure that is excluded."[19] [[19]*Ensign v. Marion County,* 140 Or.App. 114, 914 P.2d 5, 7 (1996); *see also Fox,* 93 Cal.Rptr.2d 497, 994 P.2d at 351.] The language of Rule 407 and the general presumption of admissibility laid down by Rule 402, along with persuasive authority from other courts, compel us to hold that evidence of post-accident investigations and recommendations are not automatically excluded as subsequent remedial measures.[20] [[20]In some cases, a recommendation and a remedial measure may be one and the same, as when the recommendation itself represents a change in policy. *E.g., Complaint of Consolidation Coal Co.,* 123 F.3d 126, 136 n. 9 (3d Cir.1997) (holding that " 'safety alert,' ... designed to alert ... employees to a potential danger ... and advise them of measures to avoid this danger .... is inherently a subsequent remedial measure"). This is not such a case—after Charles completed her report and recommendations, the City still had to act to implement her suggestions.]

97 P.3d 822, 826-27 (footnotes 9, 13, 17, 18, 19 and 20, included, others omitted)

This Court agrees with the Alaska Supreme Court. As sort of a last gasp, NIHH argues, "One cannot know what must be remedied if one does not investigate the cause of the injury." Defs.' Reply to Pls.' Opp'n Re: Defs' Mem. in Supp. of Defs.' Mot. in Lim. To

Exclude Health and Welfare's December 2016 Survey and Findings, NIHH's Own Root Cause Analysis and Pls.' Expert, 4. This is essentially the same argument as noted by the Alaska Supreme Court, that "the investigation is the prerequisite to any remedial safety measure." 97 P.3d at 826. This Court agrees with the analysis of the Alaska Supreme Court regarding such argument.

This Court incorporates its findings and reasoning above as to the Survey, and finds such to be applicable to NIHH's own Root Cause Analysis. This Court finds the reasons set forth by NIHH in support of their motion in limine to exclude the NIHH's own Root Cause Analysis are without merit. Accordingly, NIHH's Motion in Limine to Exclude Health NIHH's own Root Cause Analysis is denied.

3. Briggs' Expert Demetria Haffenreffer, R.N.

NIHH claims the Briggs' out-of-state expert, Demetria Haffenreffer, R.N., does not know the local standard of care for home health nurses of for a Home Health Agency in Coeur d'Alene, Idaho, and thus, her declaration should be excluded. Mem. in Supp. of Defs,' Mot. in Lim. To Exclude Health and Welfare's December 2016 Survey and Findings, NIHH's Own Root Cause Analysis and Pls.' Expert, at 9-16. Briggs claim in response:

> Finally, the defense seeks to strike the Declaration of Demetria Haffenreffer, who is a registered nurse, because the defense claims she has failed to adequately establish that she possesses actual knowledge of the applicable community standard of care for home health agency nurses. Her Declaration states: "The opinions expressed in this Declaration are my own opinions to which I can testify with reasonable medical certainty based on my education, training, experience and with actual knowledge of the community standard of care which existed in Coeur d'Alene, Idaho in 2016 for registered nurses and home health agencies providing health care to patients in the home setting, including but not limited to wound care."

Pls.' Memo. In Opp. to Defense Mot. in Lim. 6. Briggs respond that at the present time, all that is before the Court is Briggs' Motion to Amend to Add a Claim for Punitive

Damages, pointing out expert disclosures are not due until October 21, 2019 (which has now passed). Pls.' Memo. In Opp. to Defense Mot. in Lim. 18. At this stage, the Briggs argue, "the Court needs only to determine whether the record contains substantial evidence to support a 'reasonable likelihood' that Plaintiffs will be able to prove facts at some future trial to support an award of punitive damages." *Id.* at 18-19.

This Court finds NIHH's motion to exclude Briggs' out-of-state expert Demetria Haffenreffer, must be denied for two reasons. First, this Court agrees that at this juncture, that being a pending motion to amend to allow a punitive damage claim, the Briggs are not held to the same standard they would be at trial or even at a summary judgment. Second, the Declaration of Haffenreffer appears to be adequate concerning her knowledge of the standard of care. The Court will discuss these two features in that order.

First, the standard at this point is whether the record contains substantial evidence to support a reasonable likelihood that Briggs will be able to prove facts at trial to support an award of punitive damages. Idaho Code § 6-1604(2). One must keep in mind that all that is being sought to occur is to have this Court allow Briggs to amend their complaint in accordance with that statute. This is a discretionary decision. *Manning v. Twin Falls Clinic & Hospital*, 122 Idaho 47, 52, 830 P.2d 1185, 1190 (1992) In reviewing the facts, this court views those facts and inferences in a light most favorable to the plaintiffs. *Clark v. Podesta*, 2016 U.S. Dist. LEXIS 103637**21-22 (Dist. Idaho August 5, 2016). Another reason this Court took these motions under advisement was that it wanted to again read a recent decision on a related topic. In *Fisk v. McDonald, et. al.*, Kootenai County Case No. CR 2017 1802, this Court granted summary judgment, where defendants had moved for summary judgment claiming the plaintiff had not established that their expert knew the local standard of care. This

Court found the plaintiffs' expert had not established such knowledge. Plaintiffs argued that because the expert witness disclosure deadlines had not yet passed, the plaintiffs did not need to establish that knowledge at summary judgment. This Court disagreed.

> The Court above concluded that the Fisks are not required to meet the foundational requirements of Idaho Code § 6-1012 and § 6-1013 as part of their expert witness disclosure. As such, to the extent that the Hospital's summary judgment motion relies on that argument, the Court concludes that it is without merit. Nevertheless, the Hospital also argues that the declarations submitted by the Fisks in opposition to its summary judgment motion are inadmissible and, as such, the Hospital continues to assert that it is still entitled to summary judgment because the Fisks have failed to produce admissible evidence on an essential element of their claim.
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> To withstand summary judgment 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." *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002); I.C. § 6-1012. In order to offer expert testimony on the local standard of health care practice, the plaintiff must lay a proper foundation as set forth in Idaho Code § 6-1013. The plaintiff lays a proper foundation for admission of his or her expert's testimony by demonstrating:
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> > (a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed . . . .
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> I.C. § 6-1013 (emphasis added). The applicable community standard of health care practice:
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> > is specific to 'the time and place of the alleged negligence' and 'the class of health care provider that such defendant then and there belonged to . . . .' The defendant's care is judged against 'similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization if any.'
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> *Mattox*, 157 Idaho at 473, 337 P.3d at 632 (citing I.C. § 6-1012). The Idaho Supreme Court has stated:
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> > 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