

Leslie Halligan, District Court Judge  
Fourth Judicial District  
Missoula County Courthouse  
200 West Broadway Street  
Missoula, MT 59802-4292  
(406) 258-4771

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

SHARON WOLDSTAD,  
Plaintiff,

v.

PROVIDENCE HEALTH &  
SERVICES-MONTANA, d/b/a ST.  
PATRICK HOSPITAL,  
Defendant.

Dept. No. 1  
Cause No. DV-17-1021

**ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

This matter comes before the Court on the Motion for Summary Judgment ("Motion") filed by Defendant Providence Health and Services-Montana d/b/a St. Patrick Hospital ("SPH"). The Court has considered the Motion and its supporting brief and evidence, the Brief in Opposition to the Motion filed by Plaintiff Sharon Woldstad and its supporting evidence, and SPH's Reply thereto. The Court heard oral argument on the Motion on March 31, 2022. Having reviewed the record before it, the Court rules as follows:

## ORDER

The Court GRANTS Defendant's Motion for Summary Judgment. As a matter of law on the undisputed material facts, Plaintiff lacks sufficient evidence to establish the elements of her claim. The Court thus DISMISSES this case, with prejudice.

## MEMORANDUM

### I. FACTUAL AND PROCEDURAL BACKGROUND

In this medical malpractice case, Plaintiff Sharon Woldstad alleges that she was injured by negligent medical care provided by Defendant St. Patrick Hospital in the autumn of 2014. In the present Motion, SPH argues that Woldstad lacks sufficient evidence to support her claim. Thus, the Court shall recite the facts of this case as relevant to this argument.

Woldstad was admitted into SPH in September 2014 for treatment of a wound on her foot. She was 63 years old and had a history of significant medical issues. At the time she had an active prescription for Xarelto, an anticoagulant medication intended to prevent blood clots and the deep vein thrombosis conditions they may cause. Woldstad's orthopedist, Dr. Emily Heid, had prescribed the Xarelto in June 2014 after placing her in a cast for a broken toe. Upon admittance to SPH, her prescription was noted, but a SPH practitioner changed it from Xarelto to Heparin, a different medication

1 that provides similar relief. After being diagnosed with sepsis and spending  
2 a few days in SPH's intensive care unit, Woldstad came under the care of  
3 SPH's hospitalist team, including Dr. David Christiansen, an internal  
4 medicine physician with a sub-specialty in infectious disease, and Aaron  
5 Derry, a Physician Assistant, whom Dr. Christiansen supervised.

6       When SPH discharged Woldstad on October 2, 2014, her written  
7 discharge instructions included, among many other things, a note to  
8 discontinue the use of Xarelto. Mr. Derry has testified that Woldstad told him  
9 that she had voluntarily discontinued her use of Xarelto prior to her admission  
10 to SPH; this is also noted in the same discharge instruction, immediately  
11 after the note to discontinue the Xarelto. Woldstad contests whether she told  
12 Mr. Derry this, but the Court does not find this factual dispute to be material  
13 to the issues presented in the Motion. Mr. Derry has also testified that he  
14 did not see any medical need for Xarelto, Dr. Christiansen agreed and thus  
15 signed off on the discharge summary. Woldstad did not resume taking  
16 Xarelto after SPH discharged her.

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19       Two weeks after her discharge, Woldstad developed a deep vein  
20 thrombosis ("DVT") in her left leg, which was treated at Community Hospital  
21 in Missoula. Medical practitioners at Community Hospital placed her back  
22 on Xarelto. Woldstad alleges that her discontinuance of Xarelto, as  
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1 instructed by SPH, caused the DVT which then caused a host of other  
2 significant physical injuries and limitations, like an inability to walk and work.<sup>1</sup>

3 Woldstad commenced this case in October 2017, alleging that SPH  
4 was negligent when it discharged her without restarting her Xarelto  
5 prescription. SPH denies that its actions or omissions were negligent and  
6 thus it denies liability for Woldstad's injuries.

7  
8 Discovery in this case was unusually long and laborious. In April 2021,  
9 three-and-a-half years into the case, Woldstad provided to SPH her expert  
10 witness disclosure. It identifies, among others, two medical doctors: Gary  
11 Gilbert, MD, and Sharon Kawai, MD. For Dr. Kawai, the expert witness  
12 disclosure summarizes her expected testimony to be about Woldstad's  
13 needs for medical care following the DVT and it references a separate report  
14 authored by her for details. For Dr. Gilbert, in contrast, the expert witness  
15 disclosure does not refer to a separate report authored by him but instead  
16 provides an extensive explanation of his background (internist with a  
17 hematology subspecialty), what he reviewed, and the subjects on which "we  
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22 <sup>1</sup> In a response to an interrogatory from Woldstad during discovery, SPH noted that it is  
23 Woldstad's burden to prove her claimed damages were caused by the DVT, but stated  
that SPH "generally does not contest that [certain narrow categories of claims] are  
attributable to her DVT."

1 expect” Dr. Gilbert to testify.<sup>2</sup> Woldstad expected him to opine on several  
2 ways that SPH breached its standard of care in its treatment of Woldstad.

3 Discovery closed in this case on June 8, 2021.<sup>3</sup>

4 Dr. Gilbert testified at a video deposition on June 15, 2021. In that  
5 deposition, Dr. Gilbert expressed his clear disapproval with how SPH  
6 discharged Woldstad with instructions to not resume taking Xarelto. He  
7 testified about several things that SPH should have done differently, such as  
8 consulting with Dr. Heid, reviewing Woldstad’s existing records, or consulting  
9 with a hematologist before deciding to discharge Woldstad without a  
10 prescription for anticoagulant medication. What he did not do, however, was  
11 testify that there is a national standard of care that applies to Woldstad’s  
12 circumstances and that SPH’s actions or omissions violated it. He gave no  
13 testimony about an applicable national standard of care. Though counsel for  
14 Woldstad had the opportunity to do so, he did not elicit any testimony from  
15 Dr. Gilbert on this topic.  
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18 Dr. Kawai was deposed on July 2, 2021. The present Motion argues  
19 that her testimony was so inconclusive about the cause of Woldstad’s injuries  
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21 <sup>2</sup> At oral argument on March 31, 2022, Woldstad’s counsel explained that he drafted this  
22 disclosure, in consultation with Dr. Gilbert.

23 <sup>3</sup> The Court’s last case scheduling order that set June 8, 2021 as the deadline for all  
discovery. The parties agreed between themselves to disregard it. Later orders on the  
case schedule only concerned post-discovery milestones. It has become apparent to the  
Court that Woldstad may not consider discovery to be closed.

1 that the Court should consider her to be unqualified. Woldstad's Response  
2 does not contest this conclusion. Indeed, it does not even mention Dr.  
3 Kawai. The Court shall accept this concession and not consider Dr. Kawai's  
4 testimony or further analyze SPH's arguments about it.

5         SPH's Motion argues that Woldstad's claims fail as a matter of law  
6 and must be dismissed because she cannot provide expert testimony on the  
7 national standard of care applicable to SPH's handling of Woldstad's Xarelto  
8 prescription, that SPH breached that standard of care, and that the breach  
9 caused her claimed injuries. SPH also filed a motion in limine seeking to  
10 exclude or limit certain testimony at trial.

12         Woldstad's Response brief in opposition to the Motion argues that the  
13 "facts alleged in the motion do not establish even a prima facie case for  
14 summary judgment. Thus, the motion fails even if the alleged facts are true."  
15 The Response argues that Dr. Gilbert has disclosed not less than ten  
16 separate standard of care violations by SPH. To support this argument, the  
17 Response cites a Declaration of Dr. Gilbert, submitted with the Response,  
18 and the expert witness disclosure that counsel had prepared in April 2021.

19         In his Declaration, Dr. Gilbert testifies that the expert witness  
20 disclosure contains his conclusions, such as his conclusion that SPH should  
21 not have discharged Woldstad "without continuing some type of  
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1 anticoagulant for 2 to 6 weeks.” He also uses the Declaration to clarify some  
2 of his deposition testimony. The Response does not cite or rely on any legal  
3 authorities, but instead cites portions of the expert witness disclosure and  
4 insists that these, read in conjunction with the testimony in Dr. Gilbert’s  
5 Declaration, can meet Woldstad’s evidentiary burden. Finally, the Response  
6 cites the interrogatory response quoted in Footnote 1 above as a concession  
7 from SPH that the DVT caused Woldstad’s injuries.  
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9       SPH’s Reply brief notes that Woldstad’s Response abandoned Dr.  
10 Kawai’s testimony and argues that this eliminates Woldstad’s expert  
11 testimony on causation. The Reply also notes that the Response does not  
12 address the main deficiency of Dr. Gilbert’s testimony: the lack of any  
13 reference to a *national* standard of care applicable to the circumstances. At  
14 his deposition, Dr. Gilbert repeatedly testified about how his  
15 recommendations accord with how patient care is handled in the hospital  
16 system in which he works. The Reply also argues that Dr. Gilbert cannot  
17 serve as Woldstad’s expert on damages or the medical causation of her  
18 alleged injuries because Dr. Gilbert has not disclosed expert opinion on  
19 these two subjects. The Reply quotes from a brief filed by Woldstad in  
20 November 2021 asking for the opportunity to replace Dr. Kawai in which  
21 Woldstad concedes: “Woldstad has no other expert doctor on damages or  
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1 the causal effects of the DVT. Woldstad's multi-million-dollar economic  
2 damages claim is now totally unsupported and susceptible to summary  
3 judgment."

4 After SPH filed its Reply, Woldstad filed a second Declaration of Dr.  
5 Gilbert in which he again clarifies his earlier testimony. Woldstad also  
6 requested oral argument on the Motion, which the Court granted and set the  
7 hearing for March 31, 2022.

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9 At the March 31 oral argument, counsel for SPH argued that the Court  
10 should not consider the two declarations of Dr. Gilbert because Woldstad  
11 had an opportunity to obtain this testimony from him at his deposition.  
12 Counsel for Woldstad had the opportunity, or, really, the onus, to ask him  
13 clarification questions during his deposition to ensure that his testimony  
14 about the standard of care was a reference to national standards, and not  
15 just the standard where he practiced. The new testimony is inconsistent with  
16 his earlier testimony, and it is well-settled that a party cannot offer  
17 contradictory testimony in response to a summary judgment motion to create  
18 a question of fact. Counsel for Woldstad replied by arguing that the new  
19 testimony is not inconsistent because Dr. Gilbert was not asked at his  
20 deposition whether he was referring to national standards of care – and it  
21 was SPH's fault for not asking. Counsel for Woldstad further argued that the  
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1 Montana Supreme Court has repeatedly indicated that when a doctor has a  
2 national board certification, the doctor's testimony about standards of care in  
3 that field necessarily refer to the national standards of care. However, he  
4 did not provide any legal authority to support this claim.

5 Counsel for Woldstad also argued that Dr. Gilbert was disclosed as an  
6 expert on the cause of the DVT and that Woldstad herself is competent to  
7 testify on the pain she suffered as a result of the DVT. Much of the hearing  
8 was occupied with issues from SPH's motion in limine, and counsel for  
9 Woldstad repeatedly asserted that more discovery remains to be had.  
10 Notably, Woldstad has not asked for a Rule 56(f) stay of the Motion for  
11 additional discovery.  
12

13 The Court considers the Motion fully briefed and submitted for  
14 consideration.  
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## 16 **II. SUMMARY JUDGMENT STANDARD**

17 Rule 56 of the Montana Rules of Civil Procedure governs motions for  
18 summary judgment. A Rule 56(c) analysis requires that judgment "shall be  
19 rendered forthwith if the pleadings, depositions, answers to interrogatories,  
20 and admissions on file, together with the affidavits, if any, show that there is  
21 no genuine issue as to any material fact and that the moving party is entitled  
22 to a judgment as a matter of law." *Roe v. City of Missoula*, 2009 MT 417, ¶  
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1 14, 354 Mont. 1, 221 P.3d 1200. "A material fact is a fact that involves the  
2 elements of the cause of action or defenses at issue to an extent that  
3 necessitates resolution of the issue by a trier of fact." *Roe*, ¶ 14. "The party  
4 moving for summary judgment has the initial burden of establishing both the  
5 absence of genuine issues of material fact and entitlement to judgment as a  
6 matter of law." *Id.* If the moving party meets this burden, then the "burden .  
7 . . . shifts to the nonmoving party to establish that a genuine issue of material  
8 fact does exist." *Id.* (citation omitted). If no genuine issues of material fact  
9 exist, the district court "then determines whether the moving party is entitled  
10 to judgment as a matter of law." *Id.*

12 Here, Woldstad does not base her opposition to the Motion on disputed  
13 material facts. She relies on the position that SPH loses on the law, arguing  
14 that her expert evidence will be sufficient to avoid summary judgment.

### 15 **III. LEGAL ANALYSIS**

#### 16 **A. Consideration of the Declarations of Dr. Gilbert.**

17 As a threshold matter, the Court must determine what evidence is  
18 properly before it. SPH has challenged whether the Court can consider the  
19 two declarations of Dr. Gilbert submitted by Woldstad. Of the two, the  
20 second is easily disregarded. Under Rule 56, substantive briefing closes  
21 upon the submission of the reply brief, unless leave of court has been  
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1 granted. Here, the Second Declaration was provided without leave of court  
2 after SPH's Reply and makes new, substantive claims. This is clearly out of  
3 bounds, and the Court shall not consider it.

4 As to the first Declaration of Dr. Gilbert, submitted with Woldstad's  
5 Response brief, the Court has no reason to discard it entirely. However, it is  
6 well-settled that a party opposing a motion for summary judgment may not  
7 create a genuine issue of material fact by submitting a declaration that  
8 contradicts prior testimony. *See, e.g., Becker v. Rosebud Operating Servs.*,  
9 2008 MT 285, ¶ 22, 345 Mont. 368, 191 P.3d 435. Here, SPH argues that  
10 some statements in the first Declaration essentially revise Dr. Gilbert's expert  
11 disclosure in that it adds a new opinion on causation of the DVT that was not  
12 within the expert disclosure. This is a significant inconsistency, thus SPH  
13 urges the Court to refuse to consider it.  
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15 The Court does not see how the rule about contradictory prior  
16 testimony applies here. Woldstad has not argued that genuine issues of  
17 material fact preclude summary judgment; rather, she argues that summary  
18 judgment is inappropriate because her evidence is sufficient to satisfy all the  
19 elements of her claim. She is not using the first Declaration of Dr. Gilbert to  
20 create a factual dispute; rather, she is using the testimony to supplement her  
21 expert disclosure by adding a new opinion on causation. As it is, this new  
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1 opinion will make no difference in the outcome of the Motion, so the Court  
2 need not decide on whether to exclude or consider it.

3 **B. Evidence of a Breach of a National Standard of Care.**

4 As its first argument, SPH argues that it is entitled to summary  
5 judgment because Woldstad lacks sufficient evidence to satisfy one  
6 essential element of her medical malpractice claim: the applicable standard  
7 of care.

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9 “In Montana, it is well settled that the plaintiff in a medical malpractice  
10 action must establish the following elements: (1) the applicable standard of  
11 care, (2) the defendant departed from that standard of care, and (3) the  
12 departure proximately caused the plaintiff's injury.” *Howlett v. Chiropractic*  
13 *Ctr., P.C.*, 2020 MT 74, ¶ 18, 399 Mont. 401, 460 P.3d 942 (citing *Howard v.*  
14 *Replogle*, 2019 MT 244, ¶ 17, 397 Mont. 379, 450 P.3d 866). The standard  
15 of care necessary to establish the first element must be a national standard.  
16 *Howlett*, ¶ 18 (“A plaintiff must also establish that a physician's conduct  
17 breached a national standard of care.”) (citing *Norris v. Fritz*, 2012 MT 27, ¶  
18 44, 364 Mont. 68, 270 P.3d 79); *see also Chapel v. Allison*, 241 Mont. 83,  
19 92-93, 785 P.2d 204 (1990) (expressly establishing that the national, and not  
20 local, standard of care is applicable in medical malpractice cases); *Collins v.*  
21 *Itoh*, 160 Mont. 461, 469, 503 P.2d 36 (1972) (holding that a physician's  
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1 individual practice, when not based on national standards, lacks relevance  
2 to a medical malpractice case).

3 When challenged on a motion for summary judgment, “without medical  
4 expert testimony establishing the applicable standard of care and a  
5 departure from that standard, no genuine issue of material fact exists and  
6 the defendant is entitled to judgment as a matter of law.” *Howlett*, ¶ 18 (citing  
7 *Estate of Nielsen v. Pardis*, 265 Mont. 470, 473, 878 P.2d 234 (1994)).  
8

9 Here, SPH challenges the sufficiency of Woldstad’s evidence about  
10 the national standard of care applicable to SPH’s treatment of Woldstad. Dr.  
11 Gilbert has been Woldstad’s expert witness on the standard of care, but he  
12 simply has not opined on what the national standard of care is, as relevant  
13 here. The Court has scoured the admissible record regarding Dr. Gilbert’s  
14 opinions. Dr. Gilbert’s expert disclosure makes no mention of a national  
15 standard of care. At his deposition, Dr. Gilbert did not opine on a national  
16 standard of care. The closest he came to it was his statement that “I know  
17 something about national standards, but I’m far more familiar with our local  
18 V.A.” Indeed, Dr. Gilbert’s deposition testimony is replete with instances  
19 where he refers to the practices within the Boston area and the Veterans  
20 Affairs system where he works. But he does not say that these practices are  
21 national standards. Finally, his testimony in his [first] Declaration in support  
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1 of Woldstad's Response is similarly silent on the national standard of care  
2 and does not clarify his deposition testimony on whether the standards he  
3 was referencing are applicable nation-wide.

4 In the Response, Woldstad mentions "national" once, in arguing that  
5 since Dr. Gilbert has the same national board certification as Dr.  
6 Christiansen, his testimony about the standard of care is sufficient. No  
7 authority is cited to support this, and the Court is unaware of any.

8  
9 The Court has carefully considered the admissible evidence and the  
10 authorities relied upon by the parties. In the Court's review, Dr. Gilbert had  
11 three opportunities to provide sufficient evidence about the national standard  
12 of care applicable to SPH's treatment of Woldstad. That the allegedly  
13 breached standard of care in a malpractice action must be a national  
14 standard is not new, either as a theme in the law or as an issue in this case.  
15 The lack of evidence of a national standard of care is a focus of not just the  
16 Motion, but also the motion in limine simultaneously filed by SPH.  
17 Unfortunately for Woldstad, in the three times that Dr. Gilbert could have  
18 opined that SPH breached a national standard of care, he did not.

19  
20 The Court does not want to elevate form over content or make "national  
21 standards" some sort of magic words that must be recited by a medical  
22 expert; the Court simply wants to apply the law. In a malpractice action the  
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1 law requires evidence from the plaintiff of a national standard applicable to  
2 the situation, and here Woldstad has not provided it. The dispositive  
3 shortcoming is that the substance of Dr. Gilbert's admissible testimony is  
4 insufficient as a matter of law because he does not explain that the standards  
5 of care he is referencing are national standards which SPH should know  
6 about and be judged against. Thus, the Court must find SPH is entitled to  
7 judgment as a matter of law.  
8

### 9 **C. Evidence on the Remaining Elements.**

10 The Motion argues that Woldstad's expert evidence is insufficient to  
11 satisfy the other elements in her malpractice case, especially on causation –  
12 that is, whether a breach of the applicable standard of care was the cause of  
13 the many injuries claimed by Woldstad. Because the Court is finding in favor  
14 of SPH on the lack of evidence on a national standard of care, the Court  
15 need not determine whether the other evidence is insufficient and thus  
16 declines to do so.  
17

## 18 **IV. CONCLUSION**

19 SPH has met its burden to demonstrate the absence of disputed,  
20 material facts and that it is entitled to judgment as a matter of law due to the  
21 insufficiency of Woldstad's evidence. Therefore, the Court must grant its  
22 Motion for Summary Judgment and dismiss this case.  
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1 DATED this 2nd day of May, 2022.

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3   
4 Leslie Halligan  
District Court Judge

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6  
7 cc: Rexford Palmer, Esq. / Lincoln Palmer, Esq.  
8 Jori Quinlan, Esq. / Jennifer Swajkoski, Esq.  
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