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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Kelly McCarthy, Plaintiff, Appellant, and Cross-Appellee, vs. Ariane Getz, PsyD, Defendant, Appellee, and Cross-Appellant.	**SUPREME COURT NO. 20180418** **Civil No. 39-2017-CV-00236**

ON APPEAL FROM SUMMARY JUDGMENT GRANTED IN FAVOR OF
APPELLEE AND CROSS-APPELLANT
RICHLAND COUNTY DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
THE HONORABLE BRADLEY A. CRUFF, PRESIDING

BRIEF OF APPELLEE AND CROSS-APPELLANT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] The district court correctly determined that Plaintiff's claims are time-barred by the applicable statute of limitations.

[¶2] If Plaintiff's claims are not time-barred, the district court erred in excusing the Plaintiff from the requirement under North Dakota law that all elements of a medical malpractice claim, including causation, must be proved with expert testimony.

STATEMENT OF THE CASE

[¶3] Plaintiff Kelly McCarthy ("McCarthy") filed a Complaint with the district court on September 22, 2017, alleging "malpractice" and naming Ariane Getz, Psy.D. ("Dr. Getz") and Sanford Health as defendants. (Compl., Index #1.) This Complaint was not served on Dr. Getz or Sanford Health, and did not include any other factual or legal allegations other than "malpractice."

[¶4] On November 9, 2017, McCarthy filed another Complaint with the district court captioned "Wrongful Death/Medical Negligence" and alleging that Dr. Getz underestimated the risk of suicide related to her daughter, Siobhan McCarthy ("Siobhan"), that appropriate clinical actions were not taken, and that Siobhan committed suicide on September 23, 2015. (App. 5-6.) The Complaint named Dr. Getz as a defendant, and she was served with the Summons and Complaint on November 14, 2017. (App. 7.) Dr. Getz filed an Answer, denying any negligence and alleging that McCarthy's claims were barred by the applicable statute of limitations. (App. 8-10.)

[¶5] Dr. Getz served McCarthy with written discovery requests seeking information on McCarthy's expert witnesses. On March 28, 2018, McCarthy responded by producing correspondence by Thomas E. Joiner, Jr. Ph.D. (Pl.'s Resp. to Def.'s Req. for Produc. of Docs., Mar. 28, 2018, Index #15.) Dr. Joiner executed similar correspondence on April 16, 2018. (Index #16.)

[¶6] On May 23, 2018, Dr. Getz moved for summary judgment on several grounds, including because McCarthy's claims were time-barred by the applicable statute of limitations, and because McCarthy failed to disclose an expert opinion supporting the elements of the malpractice allegations against Dr. Getz. (Index #12.) McCarthy responded to Dr. Getz's Motion for summary judgment and attached an affidavit by Dr. Joiner. (Index

#24, 25.) Dr. Getz filed a reply brief to McCarthy's response. (Index #32.) A hearing on Dr. Getz's motion was held on August 21, 2018, and Dr. Getz's motion for summary judgment seeking dismissal of McCarthy's claims was granted. (App. 34-36.) The court provided its analysis and order orally in court on the record, and the written Order and Judgment were entered on September 7, 2018 and September 11, 2018, respectively. (App. at 25-26, 34-36, 37.)

[¶7] In granting summary judgment, the district court determined that reasonable minds could come to but one conclusion, that the claim for relief accrued on the date of Siobhan's death, September 23, 2015. (Order, Sep. 6, 2018, App. 35 at ¶ 3.) Plaintiff knew of Siobhan's care and treatment with Dr. Getz, was aware of Siobhan's death, and was aware of the facts which would place a reasonable person on notice that a potential claim existed on September 23, 2015. (Id.) McCarthy failed to commence this suit against Dr. Getz within the limitations period, and therefore, her claims were time-barred. (Id.) On the issue of McCarthy's failure to produce expert testimony on the elements on malpractice, and in particular the element of proximate cause, the court determined the issue was "moot" because Section 28-01-46, N.D.C.C., relating to time limitations for a plaintiff to produce an expert opinion in a medical malpractice action, did not apply to Dr. Getz. (Id. at ¶ 2.) Notice of entry of judgment was served on September 12, 2018. (Index #49.)

[¶8] McCarthy filed Notice of Appeal dated November 21, 2018, contending that the district court erred in dismissing her claims for failure to comply with the applicable statute of limitations. (App. 38-39.) Dr. Getz filed a Notice of Cross-Appeal because the district court erred when it decided that McCarthy was excused from producing expert testimony

on all elements of McCarthy's allegations of malpractice, including the element of proximate cause. (App. 41.)

STATEMENT OF THE FACTS

[¶9] Dr. Getz is a child and adolescent psychologist. Siobhan was first seen by Dr. Getz as a patient on February 23, 2015, when Siobhan was a minor, with complaints of anxiety. (Relevant portions of medical records related to visits with Dr. Getz, Index #17.) Dr. Getz's note from Siobhan's first appointment states that Siobhan was referred for mental health services by Dr. William Mayo after reporting problems with significant anxiety and depression symptoms. (Id.) Dr. Getz's initial diagnostic impression included panic disorder; generalized anxiety disorder; major depressive disorder, single episode, moderate; and parent child relational problems. (Id.).

[¶10] Siobhan next saw Dr. Mayo on March 11, 2015, for, among other things, anxiety with depression. (Relevant portions of medical records related to visits with Dr. Mayo, Index #18.) At that time, she was prescribed an anti-depressant called Lexapro. (Id.) In addition to appointments with Dr. Mayo, Siobhan saw Dr. Getz on March 31, 2015, April 16, 2015, May 14, 2015, June 22, 2015, July 2, 2015, July 31, 2015, and August 5, 2015. (Index #17.) On September 10, 2015, Siobhan had her last appointment with Dr. Mayo, and her last appointment with Dr. Getz. (Index #17, 18.) At that time, Siobhan was eighteen years old and had been prescribed Clonazepam, Wellbutrin, and Lexapro had been prescribed for her. (Ids.)

[¶11] Almost two weeks after her last appointment with Dr. Getz, on September 23, 2015, Siobhan's medical records include a note by Dr. Getz stating in part:

> Contacted mother in response to several messages she left as Siobhan is reportedly missing. Siobhan left in the middle of the night and none of her friends know where she might be. Kelly was information [sic] that I have

> no information regarding Siobhan's whereabouts. She stated that she wanted me to place Siobhan on a 72 hour hold once she is found. Kelly was informed that I could not place Siobhan on a hold unless there was reason for a hold, such as risk to herself or others. Kelly stated she would just go through the Sheriff's department then if I was not willing to do so. She was informed that there has to be ample reason to place an individual on a hold, and Siobhan is now 18, which limits Kelly's ability to make decisions for her. She was also upset that I did not return her call earlier as she has been leaving messages since 12:00 PM. She stated a return call should have taken priority. Kelly was informed by other staff that I had no information regarding Siobhan when she first called earlier today; however, Kelly denied getting that information from anyone.

As stated in the Complaint, Siobhan committed suicide on September 23, 2015.

LAW AND ARGUMENT

[¶12] The district court correctly determined that, as a matter of law, McCarthy's claims are time-barred by the applicable statute of limitations. A reasonable person could come but to one conclusion, that McCarthy was apprised of the facts that would put a reasonable person on notice of a potential claim regarding Dr. Getz's care and treatment on the date of Siobhan's death, September 23, 2015. However, if this Court determines that the district court erred and that McCarthy's claims in this matter are not time-barred, then summary judgment ought to be granted in favor of Dr. Getz because McCarthy failed to produce expert testimony on the element of causation to support her claims of malpractice against Dr. Getz.

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT PLAINTIFF'S CLAIMS ARE TIME-BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

[¶13] McCarthy did not commence this suit within two years after the claim for relief accrued on September 23, 2015, and therefore, her claims are time-barred. This Court ought to uphold the district court's dismissal of McCarthy's claims on summary judgment. A district court decision granting summary judgment is a question of law subject to a *de novo*

standard of review on the entire record. Long v. Jaszczk, 2004 ND 194, ¶ 7, 688 N.W.2d 173. "[S]ummary judgment is appropriate if no dispute exists as to the material facts or the reasonable inferences to be drawn from the undisputed facts, or if resolving disputed facts will not change the result and any party is entitled to judgment as a matter of law." Id.

[¶14] In North Dakota, an action is commenced by service of the Summons. N.D.R.Civ.P. 3. An action alleging malpractice must be commenced within two years after the claim for relief has accrued. N.D.C.C. § 28-01-18(3). This suit was commenced when the Summons was served on Dr. Getz on November 14, 2017. The claim for relief had accrued on September 23, 2015.

[¶15] The statute of limitations for malpractice actions "is silent on when an action accrues, and consequently, the determination of when an action accrues is an issue for the court." Schanilec v. Grand Forks Clinic, Ltd., 1999 ND 165, ¶ 11, 599 N.W.2d 253. "In the context of medical malpractice actions, a cause of action generally accrues on the date the alleged act or omission occurred." Id. North Dakota has adopted the discovery rule: "[T]he two-year statute of limitations begins to run 'when the plaintiff knows, or with reasonable diligence should know, of (1) the injury, (2) its cause, and (3) the defendant's possible negligence.'" Id. at ¶ 12 (quoting Zettel v. Licht, 518 N.W.2d 214, 215 (N.D. 1994)); see also Scheer v. Altru Health Sys., 2007 ND 104, ¶ 11, 734 N.W.2d 778 (quoting Schanilec). "Knowledge is an objective standard which focuses upon whether the plaintiff has been apprised of facts which would place a reasonable person on notice that a potential claim exists." Zettel, 518 N.W.2d at 215. For purposes of the statute of limitations, the question of when a plaintiff knew or should have known of the injury, its cause, and the defendant's possible negligence is often a question of fact, but it becomes a question of

law appropriate for summary judgment when reasonable minds could come to but one conclusion. Long, 2004 ND 194, ¶ 9, 688 N.W.2d 173. The district court correctly determined that reasonable minds could come but to one conclusion, that on the date of Siobhan's death, McCarthy was apprised of facts that would put a reasonable person on notice of her potential claims.

[¶16] Application of the discovery rule does not extend the limitations period beyond the date of Siobhan's death in this matter. Here, on the date of Siobhan's death, McCarthy knew that Siobhan had been receiving care and treatment from Dr. Getz, a psychiatrist. McCarthy also knew of the circumstances of Siobhan's death to the extent that she was put on inquiry and notice with respect to her current allegations. After September 23, 2015, the only occurrences are subjective: that McCarthy became convinced that she had a potential claim against Dr. Getz. This Court has made clear that the objective standard of when a reasonable person would be put on notice of a potential claim applies, and the statute of limitations is not tolled until a plaintiff becomes subjectively convinced of a claim.

[¶17] In Long, a wrongful death action, the North Dakota Supreme Court upheld summary judgment dismissing the plaintiff's medical malpractice claims against a healthcare provider because they were time-barred by the applicable statute of limitations. The plaintiff's decedent had entered the hospital on July 9, 1999 for a procedure, during which she experienced shock and went into a coma. 2004 ND 194, ¶ 10, 688 N.W.2d 173. The plaintiff's decedent died nearly two weeks later. Id. The North Dakota Supreme Court determined that "On July 9, 1999, reasonable minds could come to but one conclusion, [plaintiff] was apprised of the facts which would place a reasonable person on notice that a potential claim of medical malpractice existed." Id. That the plaintiff's decedent had gone

into shock and then a coma during a procedure was sufficient to put the plaintiff on notice of a potential claim for medical malpractice. Id. The Court determined the limitations period began to run nearly two weeks before the decedent died, when the plaintiff learned that the decedent went into a coma during the procedure. Id. at ¶¶ 2, 10, 11.

[¶18] A plaintiff must exercise diligence in investigating potential claims, and his or her failure to do so does not delay the running of the limitations period. In Zettel, the plaintiff recognized a radiologist's possible negligence in failing to properly conduct and monitor a procedure, and a timely malpractice claim was brought against the radiologist. 518 N.W.2d at 215. However, the plaintiff's claims against an assisting technician that were brought during litigation were dismissed on summary judgment. The plaintiff had argued that a reasonable person would not have suspected possible negligence by an assisting technician. Id. The North Dakota Supreme Court disagreed and determined that the plaintiff knew enough to recognize the need to investigate the possible negligence of all persons assisting with the procedure. Id. at 216. The plaintiff knew of the injury that occurred during the procedure, and he knew there was an assisting technician. Id. Thus, "a reasonable person exercising due diligence should have known of the possible negligence of the technician and anyone else associated with the procedure." Id. The plaintiff had a duty to exercise diligence in investigating his claims, and his claims against the assisting technician were time-barred and dismissed on summary judgment. Id.

[¶19] McCarthy has alleged that she delayed investigation of her claims, but delaying investigation does not toll the statute of limitations. In Froysland v. Altenburg, the plaintiff argued that the limitations period against an anesthesiologist did not begin to run until the plaintiff's attorney realized the possible negligence of an anesthesiologist. 439 N.W.2d

797, 798 (N.D. 1989). The court stated that, "as a matter of law, the discovery cannot reasonably be delayed until the injured person consults an attorney. To extend discovery to a time of consultation with an attorney would make the two-year limitation meaningless." Id. at 799.

[¶20] McCarthy argues that there are a variety of factors that delayed her discovery of her claims in this matter, but McCarthy's arguments are really that she was not immediately subjectively convinced of her claims. That is not the standard in North Dakota for when a claim for relief accrues. For a claim to accrue, "The plaintiff does not have to be 'subjectively convinced that he has been injured and that the injury was caused by the defendant's negligence.'" Long, 2004 ND 194, ¶ 9, 688 N.W.2d 173 (quoting Wheeler v. Schmid Laboratories, 451 N.W.2d 133, 137 (N.D. 1990)). "To trigger the running of the statute of limitations, [a plaintiff] need not fully appreciate the potential liability or even be convinced of his injury; he need only know enough to be on notice of a potential claim." Schanilec, 1999 ND 165, ¶ 16, 599 N.W.2d 253. The North Dakota Supreme Court has cited with favor several cases from other jurisdictions which state that legal knowledge of defendant's potential negligence is not required, and the plaintiff must only be aware of facts that would be sufficient to put the plaintiff on *inquiry* regarding *potential* claims. Id. at ¶ 13 (citing, among others, Buck v. Miles, 89 Hawaii 244, 971 P.2d 717, 722 (1999) (legal knowledge is not required); Sparks v. Metalcraft, Inc., 408 N.W.2d 347, 351 (Iowa 1987) (citation omitted) ("The statute begins to run when the person gains knowledge sufficient to put him on inquiry. On that date, [the person] is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation."); Hershberger v. Akron City Hosp., 34 Ohio St.3d 1, 516 N.E.2d 204, 208 (1987) (trial court must

determine "when the injured party became aware, or should have become aware, of the extent and seriousness of his condition ... and whether such condition would put a reasonable person on notice of need for further inquiry as to the cause of such condition").

[¶21] Considering the evidence in a light favorable to McCarthy, McCarthy knew all of the facts that would put a reasonable person on notice regarding her potential claims when she became aware Siobhan committed suicide. As stated in Schanilec, McCarthy did not need to fully appreciate potential liability or even be convinced regarding an injury. See 1999 ND 165, ¶ 16, 599 N.W.2d 253. To trigger the running of the statute of limitations, she only needed to know enough to be put on notice of a potential claim. See id. McCarthy then had two years after Siobhan's death to investigate and commence her suit, which she failed to do.

[¶22] McCarthy has relied on an Affidavit by Dr. Joiner stating that the causes of suicide are complex, family members may blame themselves for suicide, and therefore they may not realize they have potential malpractice claims. (Index #25.) Factors McCarthy is relying on, such as guilt and grief, are subjective factors. McCarthy asked the district court, and is asking this Court, to consider these subjective factors and delay the running of the statute of limitations until such a time as she was convinced of her allegations. That is not the standard in North Dakota. McCarthy knew of Siobhan's care and treatment by Dr. Getz and she knew of the alleged injury, and she had a duty to exercise diligence to investigate and bring her claims within two years of September 23, 2015. Indeed, McCarthy had legal counsel seek Siobhan's medical records within six months of Siobhan's death. (Conmy Feste Letter dated Mar. 9, 2016 to Sanford Health, Index #34.) The limitations period is not delayed for a plaintiff to consult with an attorney or to otherwise become convinced of

his or her claims; a plaintiff has a duty to be diligent and investigate after being put on notice of a potential claim. This Court ought to uphold dismissal of McCarthy's claims on summary judgment because the undisputed facts in the medical records and McCarthy's filings in this matter show reasonable minds could come but to one conclusion as to when the claim for relief accrued in this matter.

II. IF PLAINTIFF'S CLAIMS ARE NOT TIME-BARRED, THE DISTRICT COURT ERRED IN EXCUSING THE PLAINTIFF FROM THE REQUIREMENT UNDER NORTH DAKOTA LAW THAT ALL ELEMENTS OF A MEDICAL MALPRACTICE CLAIM, INCLUDING CAUSATION, MUST BE PROVED WITH EXPERT TESTIMONY

[¶23] The district court determined that whether McCarthy presented expert testimony on the element of causation was "moot" because the time limitations for disclosing an expert opinion in Section 28-01-46, N.D.C.C., did not apply to allegations of malpractice against Dr. Getz. However, expert testimony is required to prove the elements of malpractice, regardless of whether the time limitations in Section 28-01-46 apply. Upon Dr. Getz's motion for summary judgment, McCarthy was required to present competent admissible evidence, including expert testimony, on the element of causation with respect to her malpractice claims against Dr. Getz. "Summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." Schanilec, 1999 ND 165, ¶ 9, 599 N.W.2d 253.

[¶24] The district court correctly determined that McCarthy's claims are time-barred. However, if this Court disagrees and determines that McCarthy's claims are not time-barred, then summary judgment dismissing McCarthy's claims ought to be affirmed anyway because McCarthy failed to present expert testimony supporting her allegations of malpractice, in particular on the element of causation. "We will not set aside a correct result

merely because the trial court assigned an incorrect reason if the result is the same under the correct law and reasoning." Hanneman v. Cont'l W. Ins. Co., 1998 ND 46, ¶ 25, 575 N.W.2d 445 (quoting City of Jamestown v. Leevers, 552 N.W.2d 365, 369 (N.D.1996); and citing Hummel v. Mid Dakota Clinic, P.C., 526 N.W.2d 704 (N.D.1995); Thompson v. Danner, 507 N.W.2d 550 (N.D.1993); Ramsdell v. Ramsdell, 454 N.W.2d 522 (N.D.1990)).

[¶25] Dr. Getz served McCarthy with discovery requests for expert opinions to support McCarthy's allegations in this matter, which were answered. (Index #15.) Dr. Getz moved for summary judgment, in part, on the lack of expert testimony on the element of causation. McCarthy failed to present competent, admissible evidence with respect to the essential elements of her medical malpractice claims, which require expert testimony. "When no pertinent evidence on an essential element is presented to the trial court in resistance to the motion for summary judgment, it is presumed that no such evidence exists." Johnson v. Bronson, 2013 ND 78, ¶ 9, 830 N.W.2d 595 (quoting Barbie v. Minko Constr., Inc., 2009 ND 99, ¶ 6, 766 N.W.2d 458).

[¶26] The necessity of expert testimony in actions for professional negligence is well-established in North Dakota. A plaintiff in a medical malpractice action must provide "expert evidence establishing the applicable standard of care, violation of that standard, and a causal relationship between the violation and the harm complained of." Haugenoe v. Bambrick, 2003 ND 92, ¶ 11, 663 N.W.2d 175 (citing Larsen v. Zarrett, 498 N.W.2d 191, 192 (N.D. 1993)); see also Van Klootwyk v. Baptist Home, Inc., 2003 ND 112, ¶ 20, 665 N.W.2d 679 (because the standard of care and other elements of malpractice are not within the common knowledge of laypersons, expert testimony is required to support a case of

malpractice, including the applicable standard of care, violation of that standard, and a causal relationship between the violation and the harm complained of). Where a plaintiff fails to produce admissible expert testimony on the elements of a malpractice claim, summary judgment is required because the party failed to establish a material factual dispute on essential elements of the plaintiff's claims on which he or she will bear the burden of proof at trial. Johnson, 2013 ND 78, ¶ 20, 830 N.W.2d 595. The district court erred when it said whether McCarthy provided expert testimony on causation was "moot" because it had determined that Section 28-01-46, N.D.C.C. did not apply to claims against Dr. Getz. McCarthy would bear the burden of proving the element of causation at trial, and expert testimony is required on all elements of McCarthy's allegations of malpractice. As McCarthy did not produce proposed expert opinions on causation, it is presumed no such evidence exists.

[¶27] To prove allegations of malpractice, expert testimony must establish that there was a causal relationship between any violation of the standards of care and the harm complained of. Larsen, 498 N.W.2d at 194. Where the causal relationship between the defendant's alleged breach in the standard of care and the injury is not a matter within the common knowledge or comprehension of a layperson, expert testimony is required to prove causation to a reasonable degree of medical certainty. Klimple v. Bahl, 2007 ND 13, ¶¶ 14-15, 727 N.W.2d 256. Where expert testimony raises no more than speculation and conjecture about the cause of an injury, a genuine issue of material fact that the alleged breach in the standard of care proximately caused the plaintiff's injury does not exist. Id. at ¶ 15.

[¶28] Testimony regarding causation, which is completely lacking here, is crucial to establish a prima facie case for malpractice in order to avoid dismissal. In Johnson v. Mid Dakota Clinic, P.C., the North Dakota Supreme Court held that allegations by an expert that a different course of treatment may have led to a different sequence of events were insufficient to establish causation. 2015 ND 135, ¶ 17, 864 N.W.2d 269. Expert testimony establishing proximate cause is required, which is "'an immediate cause which in natural and probable sequence produces the injury complained of' and expressly excludes any assignment of legal liability 'based on speculative possibilities, or circumstances and conditions remotely connected with the events leading up to the injury.'" Id. (quoting Moum v. Maercklein, 201 N.W.2d 399, 403–04 (N.D.1972)); see also, N.D. Pattern Civil Jury Instructions C-2.15 ("A proximate cause is a cause which, in natural and continuous sequence, produces the injury, and without which, the injury would not have occurred. It is a cause which had a substantial part in bringing about the injury either immediately or through events which follow one another.") There is no proposed expert testimony that the care and treatment provided by Dr. Getz was the proximate cause of Siobhan's suicide as defined by North Dakota law.

[¶29] The district court determined that Section 28-01-46, establishing deadlines for initial disclosures of expert opinions in certain medical malpractice actions, did not apply in this matter. However, even if the time limitations in Section 28-01-46 do not apply, that does not excuse the requirement of expert testimony to establish the elements of a claim for malpractice. See Van Klootwyk, 2003 ND 112, ¶ 20, 665 N.W.2d 679 (prior to amendment, nursing homes were not specifically named in Section 28-01-46, and therefore the three-month time limit was not applicable, however, expert testimony was still required

to support a prima facie case of malpractice); Heimer v. Privratsky, 434 N.W.2d 357, 359–60 (N.D. 1989) (Section 28-01-46 was not meant to limit the requirement of expert witnesses to professional negligence actions involving only physicians, nurses, and hospitals, as Section 28-01-46 applied to at that time. The legislative history indicates that the statute is simply designed to minimize frivolous claims against specifically mentioned healthcare providers, but there was no intent to restrict the necessity of expert testimony to actions involving only those stated in the statute.). Even if Section 28-01-46 does not apply, that does not abrogate the requirement of expert testimony to support the elements of malpractice claims.

[¶30] In Johnson v. Bronson, proposed expert testimony by the plaintiff's witnesses lacked foundation, failed to establish the standard of care, and failed to offer any testimony regarding causation. 2013 ND 78, ¶¶ 18-19, 830 N.W.2d 595. Among other deficiencies, neither of the plaintiff's expert witnesses provided any proposed testimony to prove causation. Id. at ¶ 19. The plaintiff was required to produce sufficient expert testimony on the elements of malpractice to survive summary judgment, but did not, and therefore, dismissal of the plaintiff's claims on summary judgment was upheld on appeal.

[¶31] Dr. Joiner's Affidavit submitted in response to the Motion for Summary Judgment admits that suicide is a "complex issue" that involves many different factors such as "Siobhan's behaviors of self-injury such as cutting, high anxiety and depression, and a feeling of not belonging to the family," which, in Dr. Joiner's opinion, he attributes to resulting in Siobhan's suicide. (Index # 25.) By Dr. Joiner's own admission, in his opinion, numerous factors other than Dr. Getz's care and treatment of Siobhan resulted in Siobhan's suicide. Nowhere does Dr. Joiner provide an opinion on how the care and treatment

provided by Dr. Getz that last occurred two weeks before Siobhan's death was a proximate cause of her suicide. See N.D. Pattern Civil Jury Instructions C-2.15 (a proximate cause is "a cause which, in natural and continuous sequence, produces the injury, and without which, the injury would not have occurred" and "which had a substantial part in bringing about the injury either immediately or through events which follow one another."). Therefore, if this Court determines McCarthy's claims were timely, then McCarthy's claims must still be dismissed due to the lack of an expert opinion establishing the elements of malpractice, and in particular, the element of causation.

CONCLUSION

[¶32] For the foregoing reasons, this Court ought to uphold the district court's decision granting summary judgment and dismissing McCarthy's claims against Dr. Getz, which are time-barred under the applicable statute of limitations. If this Court determines that McCarthy's claims are not time-barred, then this Court ought to uphold summary judgment and dismissal of McCarthy's claims because McCarthy failed to produce expert testimony on the issue of causation in response to Dr. Getz's motion for summary judgment.

Respectfully submitted April 17th, 2019.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Kelly McCarthy, Plaintiff, Appellant, and Cross-Appellee, vs. Ariane Getz, PsyD,, Defendant, Appellee, and Cross-Appellant.	**SUPREME COURT NO. 20180418** Civil No. 39-2017-CV-00236 **CERTIFICATE OF SERVICE**

[¶1] I hereby certify that on April 17, 2019 the following document(s):

Brief of Appellee and Cross-Appellant

were served by electronic mail only on the following:

Mark A. Meyer
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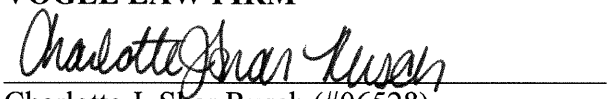
Dated this 17th day of April, 2019.

VOGEL LAW FIRM

By: 
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