

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Nancy Ortega,)	
)	Supreme Court Case No.:
Plaintiff-Appellant,)	20180331
)	
v.)	District Court Case No.:
)	08-2016-CV-02312
Sanford Bismarck;)	
Christie Iverson, MD,)	
)	
Defendant-Appellee.)	

**APPEAL FROM THE ORDER GRANTING DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT DATED JULY 11, 2018
THE HONORABLE THOMAS SCHNEIDER, PRESIDING
SOUTH CENTRAL JUDICIAL DISTRICT**

BRIEF OF APPELLANT

Respectfully submitted by:

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Statutes and Other Authorities

N.D.C.C. 28-01-46	¶4, 8, 12, 15 17, 18, 19
<u>N.D.R.Civ.P.</u> , Rule 56	¶10, 16

STATEMENT OF THE ISSUES

1. Did the district court err by dismissing Plaintiff's claims in its Order Granting Defendant's Motion for Summary Judgment dated July 11, 2018?

STATEMENT OF THE CASE

¶1 Nancy Ortega, the Appellant, presented to Dr. Iverson of Sanford on August 14, 2014 to have her right ovary removed due to a dermoid tumor that was located on the right ovary. (*Comp. Appx. pg. 4*). On this same date, Dr. Iverson performed a surgery, but negligently removed the left ovary during surgery. *Id.* Nancy Ortega had to have a second surgery on October 2, 2014 to remove the right ovary. (*Answer, Appx. pg. 9*)

¶2 Ortega brought a negligence claim in her Complaint against Dr. Christie Iverson and Sanford Medical Center on August 9, 2016, for negligently removing the removing the wrong ovary. (*Comp. Appx. pg. 4*). The Defendants provided an Answer to the Plaintiff Ortega's Complaint, generally denying any negligence or damages. (*Answer, Appx. pg. 8*). A jury trial on the matter was scheduled to commence on August 14, 2018. (*Reg. of Actions, Appx. pg. 2*).

¶3 Defendants Sanford and Dr. Iverson filed a motion for summary judgement with the district court on May 15, 2018, arguing two reasons, (1) Plaintiff failed to have an expert relating her moodiness / depression to the removal of her ovary, and (2) that Plaintiff can't support she suffered any damages. (*Def. Brief, Appx. pg. 11*). Ortega filed a timely response asserting several material issues of fact to the defendant's motion on June 15, 2018 in which she argued an expert opinion was not required to support all types of her damages, including the damage of undergoing a second surgery and the loss of her right ovary, but further referred to the Affidavit of Dr. Iverson that identified a wide variety symptoms Ortega may have. (*Plaintiff. Brief, Appx. pg. 28*). Plaintiff had previously identified Dr. Iverson as its expert in this matter.

¶4 On July 11, 2018, the district court issued its Order dismissing the case, indicating that Plaintiff failed to file an admissible expert opinion as required by N.D.C.C. 28-01-46 within three months commencing an action. (Order, Appx. pgs. 33-34). The Defendant's Motion for Summary did NOT request a dismissal pursuant to N.D.C.C. 28-01-46. (*Def. Brief, Appx. pgs 11-24*). A motion hearing held on July 2, 2018, in front of the Honorable Thomas Schneider, and neither the court, nor the parties posed any arguments that an expert opinion pursuant to N.D.C.C. 28-01-46 needed to be filed, or should have been filed in this case. (*Transcript, pgs 1-14*).

STATEMENT OF THE FACTS

¶5 Nancy Ortega, the Appellant, presented to Dr. Iverson of Sanford on August 14, 2014 to have her right ovary removed due to a dermoid tumor that was located on the right ovary. (*Comp. Appx. pg. 4*). On this same date, Dr. Iverson performed a surgery, but negligently removed the left ovary during surgery. *Id.* Nancy Ortega had to have a second surgery on October 2, 2014 to remove the right ovary. (*Answer, Appx. pg. 9*)

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LAW AND ARGUMENT

A. Standard of Review

¶9 The standard of review for a district court's grant of a summary judgment is established as follows:

¶10 Under N.D.R.Civ.P. 56, summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Hasper v. Center Mut. Ins. Co., 2006 ND 220, P5, 723 N.W.2d 409. The party moving for summary judgment must show there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. Trinity Hosps. v. Mattson, 2006 ND 231, P10, 723 N.W.2d 684. A district court's decision on a motion for summary judgment is a question of law that we review de novo on the record. *Id.* In determining whether summary judgment was appropriately granted, we view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record. Hasper, at P5. Erickson v. Brown, 2008 ND 57, 747 N.W.2d 34.

¶11 The interpretation and application of a statute is a question of law, which is fully reviewable on appeal. In re Estate of Samuelson, 2008 ND 190, ¶ 11, 757 N.W.2d 44. Determining a party's intent and whether a mistake of fact or law exists are questions of fact, which are subject to the clearly erroneous standard of review. See Agnes M. Gassmann Revocable Living Trust v. Reichert, 2011 ND 169, ¶ 14, 802 N.W.2d 889.

B. The district court erred by granting summary judgment on an issue which had not been briefed before the Court.

¶12 In this case, the district erred by dismissing the Plaintiff's claim on an issue not argued by either party, and an issue not briefed by either party before the district court, nor was a motion brought on the issue. In its Order Granting Defendant's Motion for Summary Judgment, the district court analyzed the applicability of NDCC 28-01-46, which requires Plaintiff serve on Defendant "an affidavit containing an admissible expert opinion to support a prima facie case of professional negligence within three months of the commencement of the action." NDCC 28-01-46. In this case, the action was commenced in August of 2016 and at no time did Plaintiff serve an affidavit on Defendant.

¶13 As indicated above, the motion for summary judgment filed by defendant in May of 2018 argued that an expert opinion by Plaintiff was required to (1) establish a connection between the medical negligence and one aspect of her damages; as well as (2) defendants' argument that Ortega hadn't suffered any damages. (*Def. Brief, Appx. pgs 11-24*). Plaintiff responded to the motion arguing several issues of material fact as well as legal argument, including (1) arguing that expert testimony is not required for a jury to understand that removing the wrong organ (right ovary) and loss of the right ovary is a damage, (2) undergoing a second surgery is a damage not requiring expert testimony, and (3) that the Affidavit of Dr. Iverson herself supports Ortega being impacted by the removal of both ovaries. (*Plaintiff. Brief, Appx. pg. 28*).

¶14 In its Order, the district court did not address or analyze any of the law, legal arguments or other evidence presented by either of the parties, nor did is analyze any arguments presented at the summary judgment hearing on July 2, 2018. (*Order, Appx. pg. 31*). Instead of considering the motion of defendant, the district court granted summary

judgment finding the removal of the right ovary instead of the left ovary was not an “obvious occurrence” or “wrong organ” exception to the affidavit requirement of NDCC 28-01-46.

¶15 NDCC 28-01-46 provides that the district court can dismiss an action without prejudice *on motion* (emphasis added), however nowhere in this section does it permit a district court to dismiss a case without a proper motion before the court, and further without allowing a party to be heard on the matter. Id. As indicated above, Defendant did not file a motion for dismissal based on a failure by Plaintiff provide an affidavit within three months of commencement pursuant to NDCC 28-01-46.

¶16 In reviewing ND Rules of Civil Procedure Rule 56, it provides a party may move for summary judgment, and a responding party must have at least thirty (30) days to respond. N.D.R.Civ.P. Rule 56. Nowhere in Rule 56 does not grant the district court authority to grant summary judgement against a party without notice and without an opportunity to be heard on the matter.

- C. If the parties had briefed and argued a motion pursuant to N.D.C.C. § 28-01-46, an expert opinion would not have been required as this was a “performance of a medical procedure upon the wrong patient, organ, limb, or other part of the patient’s body or other obvious occurrence.”

¶17 As indicated above, the parties did not brief or argue at the district court level that an affidavit was required pursuant N.D.C.C. § 28-01-46. It can be safe to assume that defendant agreed the removal of the wrong ovary was a medical procedure on the “wrong organ” or “other obvious occurrence.” In this case, the action was commenced in August of 2016, and defendant never filed a motion to dismiss pursuant to N.D.C.C. § 28-01-46.

¶18 In fact, the district court at the July 2, 2018 summary judgment hearing itself asked this direct question to defense counsel to clarify that Dr. Iverson had in fact removed the wrong ovary, stating:

The Court: Okay. Just a minute. The doctor did admit that she took out the wrong ovary; correct?

Ms. Rummel: That's correct. ...

(Transcript, pg 3, lines 11-13).

There is no dispute that Dr. Iverson removed the wrong ovary on August 14, 2014, removing the left ovary instead of the right ovary. There is no dispute between the parties that Ortega is missing an organ (her left ovary) as it should not have been removed on August 14, 2014. There is no dispute that Ortega had to undergo a second surgery on October 2, 2014 to remove the right ovary with the dermoid cyst. The facts of this clearly fall within the exception requirement of NDCC 28-01-46 and an affidavit would not be required in this matter.

D. If the district court had considered the Defendants's motion, it should have been denied.

¶19 As indicated above, the district court did not consider the merits of defendants motion in its July 11, 2018 Order. (*Order, Appx. pg. 31*). In reviewing the Order, the district court analyzed NDCC 28-01-46 to determine whether or not this case fell into the "obvious occurrence" or "wrong organ" exception requirement for providing an affidavit. The district court does not reference the arguments or motion of defendant in its Order.

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Defendant-Appellee.)	

Certificate of Service

The undersigned certifies, pursuant to Rule 5 (f) of the North Dakota Rules of Civil Procedure, that on November 28, 2018, a true and correct copy of the following document(s):

1. Appellant’s Brief,
2. Appendix of Appellant, and
3. Certificate of Service.

was served, via email transmission, upon the following:

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