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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Tessa Bride, as Personal Representative of the Estate of John L. Pelkey, and as surviving daughter of John L. Pelkey,

Plaintiff and Appellant,

vs.

Trinity Hospital; Marc Eichler, MD; Kim Koo, MD; John Doe, MD, 1-10; John Doe, RN 1-10; and John Doe, 1-10,

Defendants and Appellees.

BRIEF OF APPELLEES TRINITY HOSPITAL, MARC EICHLER, M.D., JOHN DOE, MD 1-10, JOHN DOE, RN 1-10, AND JOHN DOE 1-10

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANTS' SUMMARY JUDGMENT AND DISMISSING THE PLAINTIFF'S COMPLAINT WITHOUT PREJUDICE, DATED JULY 11, 2018, FOR THE NORTH CENTRAL JUDICIAL DISTRICT, THE HONORABLE STACY J. LOUSER, PRESIDING

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INTRODUCTION

[¶1] There are no issues in Plaintiff's appeal with a basis in law or fact. Plaintiff's arguments are not good-faith efforts to extend existing law. All issues presented for review are well-settled. Accordingly, Defendants ask this Court to affirm the district court dismissal of Plaintiff's professional-negligence action.

STATEMENT OF THE ISSUES

[¶2] Whether the district court erred in dismissing a professional-negligence action against physicians, nurses, and a hospital, where Plaintiff failed to serve upon Defendants 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; where Plaintiff and Defendants did not stipulate to a later date for service of the expert affidavit; and where Plaintiff did not move the district court to set a later date for service of the expert affidavit until long after the three-month period expired.

[¶3] Whether the "obvious occurrence" exception applies, where Defendants allegedly failed to properly diagnose, monitor, medicate and treat a surgical-spinal-injury patient by failing to identify certain risks of spinal injury, failing to order appropriate fall risk precautions, and failing to adequately monitor him.

STATEMENT OF THE FACTS AND CASE

[¶4] At all times relevant to this action, Trinity was a hospital and Dr. Eichler was a neurosurgeon employed by Trinity. See, Appellant's Brief: Index at 14, ¶¶1–2. The fictitiously-named Defendants were allegedly all physicians, nurses, and Trinity employees. See, id. at ¶¶6–8.

[¶5] Tessa Bride ("Plaintiff") commenced a medical-malpractice action on September 15, 2017. See, id. at 33, ¶9. The Complaint alleged Trinity Hospital; Marc Eichler, MD; and fictitiously-named Defendants ("Defendants") "failed to properly diagnose, monitor, medicate and treat Mr. Pelkey" by failing to identify certain risks of spinal injury, failing to order "appropriate" fall risk precautions, and failing to "adequately" monitor him. See, id. at 10–11, ¶¶40–41. The Complaint did not allege that Defendants failed to remove a foreign substance from Mr. Pelkey's body. See, id. at 43, ¶10. It also does not allege that Defendants performed a medical procedure on the wrong patient, organ, limb or part of Mr. Pelkey's body. Id.

[¶6] The Complaint alleged that an "admissible expert opinion pursuant to North Dakota Century Code Section 28-01-46" had "been obtained by

Plaintiff to support these allegations" at the time of service. Id. at 11, ¶42. This was false. See, id. at 33, ¶9 (Plaintiff "acknowledges she did not submit an expert affidavit … before the expiration of three months following commencement of the action"); id. at 26 (Plaintiff's expert affidavit was dated May 23, 2018).

[¶7] Within three months of commencing the action, Plaintiff neither (1) served Defendants with an affidavit containing an admissible expert opinion supporting a prima facie case of professional negligence (see, id.); nor (2) moved the Court to set a later time for service of the expert affidavit (see, id. at 33, ¶9).

[¶8] A proposed scheduling plan, dated February 15, 2018 was executed by counsel for all parties. See, id. at 29. The scheduling plan was generic and did not modify the three-month deadline for service of the expert affidavit. See, id at 27–29. Other than adding a pretrial conference, the district court approved the scheduling plan in its entirety and incorporated its terms into a scheduling order. See, id. at 30.

[¶9] On April 23, 2018, Trinity Hospital; Marc Eichler, MD; and the fictitiously-named Defendants ("Defendants") filed a motion for summary judgment, which sought dismissal of Plaintiff's action for failure to comply with North Dakota Century Code Section 28-01-46. See, id. at 31–32, ¶3.

[¶10] On May 23, 2018, Plaintiff filed a brief opposing the motion for summary judgment. See, id. at 32, ¶4. Steven M. Bloomfield, M.D., prepared an affidavit, which was submitted as an exhibit to the brief. See, id. at 2 (Doc #52: Exhibit F – Bloomfield affidavit); id. at 26.

[¶11] A hearing for the motion for summary judgment was held on July 2, 2018. See, id. 32, at ¶5. The district court dismissed the lawsuit on July 11, 2018. See, id. at 27, ¶¶ 19–20. This appeal follows.

LAW AND ARGUMENT

I. This Court has Repeatedly Affirmed District Court Dismissals or Summary Judgments of Professional Negligence Cases where the Plaintiff Failed to File an Expert Affidavit

[¶12] This Court's "standard for summary judgment is well-established" (Johnson v. Bronson, 2013 ND 78, ¶9, 830 N.W.2d 595), and it has "repeatedly affirmed district court dismissals or summary judgments of professional negligence cases where the plaintiffs failed to file an expert affidavit." Pierce v. Anderson, 2018 ND 131, ¶14, 912 N.W.2d 29 (citing Cartwright v. Tong, 2017 ND 146 ¶14, 896 N.W.2d 638; Greene v. Matthys, 2017 ND 107, ¶¶ 13–15, 893 N.W.2d 179; Haugenoe v. Bambrick, 2003 ND 92, ¶11, 663 N.W.2d 175).

II. Because Plaintiff Concedes She did not Submit an Expert Affidavit Within Three Months of Initiating a Medical Malpractice Action, and Because no Exception to the Rule Requiring Service Within Three Months Applies, the District Court did not err in Dismissing Plaintiff's Action

[¶13] North Dakota Century Code Section 28-01-46 requires a plaintiff bringing "an action for injury or death alleging professional negligence by a physician, nurse," or "hospital" to serve the defendants with an affidavit containing an admissible expert opinion supporting a prima facie case of professional negligence. The expert affidavit must be served within three months of commencing the action, unless an exception applies. Id. If the plaintiff fails to serve the affidavit within the three-month period, and if no exception to the rule applies, then the district court is required to dismiss the plaintiff's action. Id.

[¶14] There are only two exceptions to the requirement that the expert affidavit be served within three months of commencing the action: (1) if the plaintiff moved the district court for an extension within three months of initiating the action, and if the plaintiff proves that good cause exists for granting the extension, then the district court may (but is not required to) set a later date for serving the affidavit; and (2) if the alleged negligence was an "unintentional failure to remove a foreign substance from within the body of a patient, or performance of a medical procedure upon the wrong patient, organ, limb, or other part of the patient's body, or other obvious occurrence," then the plaintiff is not required to submit an expert affidavit at all. See, id.

[¶15] The undisputed facts in the record establish: (1) that Plaintiff initiated this action on September 15, 2017; (2) that Plaintiff did not move the Court to set a later date for serving the expert affidavit; and (3) that Plaintiff did not serve an expert affidavit on Defendants until May 23, 2018. See, Appellant's Appendix at 33, ¶9. Therefore, because no exception to the general rule apples, Defendants are entitled to dismissal as a matter of law. The district court did not err in granting summary judgment.

A. Defendants are within the class of persons Section 28-01-46 applies to—i.e., physicians, nurses, and hospitals

[¶16] At all times relevant to this action, Trinity was a hospital and Dr. Eichler was a physician employed by Trinity with a specialization in neurosurgery. See, Appellant's Brief: Index at 14, ¶¶1–2. The fictitiously-named Defendants were allegedly all physicians, nurses, or Trinity employees. See, id. at ¶¶6–8. Therefore, all Defendants are within the class of persons covered by Section 28-01-46.

B. Plaintiff's Complaint alleges medical malpractice resulting in injury or death, which is a type of professional-negligence action governed by Section 28-01-46

[¶17] This is a professional negligence matter. In North Dakota, as a general rule, "a profession is an occupation that requires a college degree in a specific field." Jilek v. Berger Elec., Inc., 441 N.W.2d 660, 663 (N.D. 1989). Physicians and nurses are professionals, and medical-malpractice actions constitute "professional negligence" actions within the meaning of Section 28-01-46. Cf. Johnson v. Bronson, 2013 ND 78, ¶2, 14, 20, 830 N.W.2d 595 (medical-malpractice claim against hospital, physicians, and nurses subject to professional negligence statute).

[¶18] Dr. Eichler was, at all times relevant to this action, a physician licensed to practice medicine in the State of North Dakota. See, Appellant's Appendix at 14, ¶2. Dr. Eichler utilized his professional training and judgment as a neurosurgeon to render the allegedly negligent medical treatment. See, id. at 10–11, ¶¶39–41. Similarly, the claims against the fictitiously-named Defendants arise from the negligent medical treatment they allegedly provided. See, id. at 8–9, ¶¶23, 26, 28. It is alleged that malpractice resulted in personal injury or death. See, id. at 9, ¶¶29–35. Consequently, the conduct complained of constitutes professional negligence.

[¶19] It should be noted: "professional negligence" encompasses both direct-liability and vicarious-liability claims. See, e.g., Johnson v. Bronson, 2013

ND 78, ¶2, 14, 20, 830 N.W.2d 595 (lawsuit alleging negligent credentialing, negligent supervision, and respondeat superior claims against a hospital—arising from the alleged medical malpractice of physicians, nurses, and other hospital personnel—were properly dismissed, where plaintiff failed to submit an affidavit establishing a prima facie case of professional negligence). Therefore, Plaintiff's claims against Trinity Hospital, Dr. Eichler, and the fictitiously-named physicians and nurses are all "professional negligence" claims governed by Section 28-01-46.

C. The District Court did not err in dismissing the professional negligence action for failure to serve an expert affidavit within three months of initiating the action

[¶20] The district court dismissed the lawsuit because the undisputed facts show Plaintiff did not submit an expert affidavit within three months of initiating a professional negligence action. See, Appellant's Appendix at 33, ¶9. This is in accord with the statute's plain language and was not an error. Dismissal should therefore be affirmed.

[¶21] Plaintiff's argument that the district court "wholly ignored legislative intent" is baseless. The district court ascertained the legislative intent in exactly the way it was supposed to: it looked to the plain language of the statute, gave every word its ordinary meaning, and followed the binding precedents of this Court. Moreover, legislative histories were submitted that unequivocally show that the Legislature intended, by the 2009 amendment, to legislatively reverse Scheer v. Altru Health System, 2007 ND 104, 734 N.W.2d 778 (permitting district courts to set a later date for serving the expert affidavit, upon a showing of good cause, even if the motion for extension was made more than three months after the professional negligence action was initiated). Plaintiff's arguments are foreclosed.

1. The clear and unambiguous language of Section 28-01-46 compels district courts to dismiss medical-malpractice lawsuits, where the plaintiff (1) failed to serve an admissible expert affidavit upon defendants within three months of initiating the lawsuit, and (2) failed to request an extension within that three-month period

[¶22] In medical malpractice actions, courts do not have discretion to grant extensions, unless they are requested within three months after the action was commenced. The plain language of North Dakota Century Code Section 28-01-46 makes this clear.

[¶23] Determining that extensions cannot be granted more than three months after a medical malpractice action is initiated involves statutory construction. This Court's standards for interpreting a statute are well established:

> Our primary goal in statutory construction is to ascertain the intent of the legislature, and we first look to the plain language of the statute and give each word of the statute its ordinary meaning. When the wording of the statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. If, however, the statute is ambiguous or if adherence to the strict letter of the statute would lead to an absurd or ludicrous result, a court may resort to extrinsic aids, such as legislative history, to interpret the statute. A statute is ambiguous if it is susceptible to meanings that are different, but rational. We presume the legislature did not intend an absurd or ludicrous result or unjust consequences, and we construe statutes in a practical manner, giving consideration to the context of the statutes and the purpose for which they were enacted.

Riemers v. Jaeger, 2018 ND 192, ¶11, 916 N.W.2d 113. Additionally, this Court "interpret[s] statutes to give meaning and effect to every word, phrase, and sentence, and [it does] not adopt … construction[s] [that] would render part of the statute mere surplusage." State v. Laib, 2002 ND 95, ¶13, 644 N.W.2d 878.

[¶24] The statutory text is clear and free of ambiguity:

> Any action for injury or death alleging professional negligence by a physician, nurse, [or] hospital … ***must*** be dismissed without prejudice on motion unless the plaintiff serves upon the 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. The court may set a later date for serving the affidavit for good cause shown by the plaintiff ***if the plaintiff's request for an extension of time is made before the expiration of the three-month period following commencement of the action***.

N.D. Cent. Code § 28-01-46 (emphasis added).

[¶25] The word "if" signals that a condition precedent must be satisfied before the contingency can operate. See, e.g., MidAmerica Construction Management, Inc. v. MasTec North America, Inc., 436 F.3d 1257, 1263 (10th Cir. 2006) (citing Black's Law Dictionary (8th Ed. 2004)); accord, DeForest v. N.D. Dept. of Transp., 2018 ND 224, ¶10, 918 N.W.2d 432 (recognizing that the word "if" introduces a conditional clause). In Section 28-01-46, the word "if" directly precedes the requirement that extensions be requested within the three-month period. This makes timely requesting an extension the sentence's condition precedent. The word "may" directly precedes the language authorizing the court to grant extensions. See id. This makes the Court's authority to grant extensions the sentence's contingency. Courts therefore do not have discretion to "set a later date for serving the affidavit for good cause shown," unless "the plaintiff's request for an extension of time is made before the expiration of the three-month period following commencement of the action." See, § 28-01-46.

[¶26] Because it is undisputed that Plaintiff did not submit an expert affidavit within three months of initiating the medical malpractice action, and that Plaintiff did not move the district court to set a later date for service of the expert affidavit, within the three-month period (see, Appellant's Appendix at 33, ¶9), the district court's grant of summary judgment should be affirmed.

2. Plaintiff's reading of the statute renders the word "if" mere surplusage

[¶27] Plaintiff's requested construction of the statute should be disregarded because it renders every word of the 2009 amendment mere surplusage. As previously noted, statutes are interpreted to give meaning and effect to every word, phrase, and sentence, and a construction should not be adopted that renders a word mere surplusage. See, State v. Laib, 2002 ND 95, ¶13, 644 N.W.2d 878.

[¶28] Plaintiff argues that the "statute does not state that the court can only set a later date for the service of an affidavit if the request is made within three months of the filing of the Complaint." Appellant's Brief at ¶39. Plaintiff continues,

> While the statute specifically recognizes the court may set a later date for serving the affidavit if the plaintiff's request for an extension of time is made before the expiration of the three-month period, the statute is silent as to whether the court is deprived of such discretion if the request occurs after the three months has lapsed.

Id. at ¶46. This reasoning is specious and directly contrary to the plain language of the State. A construction that renders an entire legislative amendment mere surplusage is untenable. The word "If," in the context of

Section 28-01-46, clearly means "if and only if." Cf. Woods v. Cohen, 844 P.2d 1147, 1149 (Ariz. 1992) (where a vicarious liability statute began "'[a] person is criminally accountable for the conduct of another *if*' and then lists various circumstances in which that is the case," the word "if" was construed to mean "if and only if"). Plaintiff's construction should be rejected.

3. The legislative history confirms the Legislature's intent: to clarify that district courts do not have discretion to grant extensions requested after the three-month period had ended

[¶29] The statutory language is clear and unambiguous, so extrinsic aids need not be resorted to. Alternatively, if this Court deems the statutory text ambiguous, the legislative history corroborates Defendants' construction of Section 28-01-46.

[¶30] If the statutory text is ambiguous, "a court may resort to extrinsic aids, such as legislative history, to interpret the statute." See, Riemers v. Jaeger, 2018 ND 192, ¶11, 916 N.W.2d 113. The Legislature amended Section 28-01-46 in the 2009 legislative session, which was its first opportunity for amendment after Scheer v. Altru Health System, 2007 ND 104, 734 N.W.2d 778 (N.D. 2007) was announced. See, 2009 N.D. Sess. Laws Ch. 274, §1. The amendment added the 24 words indicated in bold: the "court may set a later date for serving the affidavit for good cause shown by the plaintiff, ***if the plaintiff's request for an extension of time is made before the expiration of the three-month period following commencement of the action***." See, id. (emphasis added).

[¶31] Prior to the law being passed, General Counsel to the North Dakota Medical Association, Dean Haas, testified before the House Judiciary Committee. See, Appellees' Appendix at APP. 45–46, 65–66 (Hearing on H.B. 1302 Before the H. Judiciary Comm. (N.D. Jan. 27, 2007)). He testified that House Bill 1302 was an amendment "in response to a North Dakota Supreme Court opinion, Scheer v. Altru Health System." Id. at 65. The statement continues, "HB 1302 amends the statute to require that a request for an extension of time to serve the expert affidavit be made ***before*** the expiration of the three month period." Id. (emphasis added).

[¶32] The record of the Judiciary Committee Hearing on House Bill 1302 demonstrates the legislative intent behind the statute's amendment. There was testimony that, prior to the 2009 amendment, it was generally understood by "plaintiffs and their lawyers" that requests for extension were to be made "before the three months expired and certainly before the defendant makes a motion to dismiss." See, id. at 47 (statement of Tracy Kolb); accord, Weasel v. St. Alexius Medical Center, 230 F.3d 348 (8th Cir. 2000) (holding that extensions cannot be granted unless requested within the three-month period). Testimony continued that Scheer v. Altru Health System, a "3-1-1 decision," had incorrectly "interpreted the exception … to allow a plaintiff to make a showing of good cause, even after the three months had expired." See, Appellees' Appendix at APP. 48 (Hearing on H.B. 1302 Before the H. Judiciary Comm (N.D. Jan. 27, 2007)). Testimony criticized Scheer's construction of Section 28-01-46 on the following grounds: (1) it "defeats the purpose of the statute," which is to screen, at the earliest opportunity, "medical negligence cases that cannot be supported by an expert" so as to "avoid unnecessary, protracted litigation" (id.); and (2) it contradicts "what everyone understood [the statute] to mean" (id. at 49). Finally, in debate, Representative Klemann declared: "after August 1, 2009, all the attorneys are going to know that they have to file a request for an extension of time before the three month period is up, or they're on the hook" Id. at 51.

[¶33] Based on the foregoing, two things are clear: (1) the Legislature disagreed with this Scheer Court's interpretation of Section 28-01-46; and (2) amending Section 28-01-46 was intended to clarify the meaning of the statute, so no extensions would be granted unless the request was made within three months of the lawsuit's initiation. The legislative intent is abundantly clear: the district court did not have the authority to grant Plaintiff an extension.

[¶34] It is worth noting that Plaintiff's precise situation—i.e., a claim dismissed for failure to file an affidavit that cannot be refiled because the two-year statute of limitations has expired—was expressly considered by the Legislature before the amendment was passed. Despite the legislators' understanding that, if they passed the amendment, some claims would be permanently time-barred, they passed the amendment anyway.

[¶35] During Ms. Kolb's testimony, Representative Zaiser asked a question: do plaintiffs with meritorious cases "ever fail to meet … that 90-day threshold?" Id. at 49. Ms. Kolb admitted "there have probably been some." Id. at 50. When things were opened up for discussion, Representative Griffon made the following argument:

> [In an analogous case to Scheer], the plaintiff will be left without a recourse…. [In Scheer], they were so close to the two-year statute-of-limitation[s] time period, that if the court dismissed without prejudice, for missing that deadline, the plaintiff cannot file the case again. I don't think there is a problem out here, and we are creating an extreme punishment to a plaintiff, who through no fault of their own, it was an attorney's fault in Grand Forks that forgot to submit that. I don't know why it is necessary. Right now the law, the ND Supreme Court would rule, for good cause, he can file that action….

Id. at 52. Representative Klemin disagreed and stated that a plaintiff is not without recourse because she can bring a legal-malpractice action against her attorney. See, id. Over Representative Griffin's concerns, the committee voted to recommend passing House Bill 1302. Id. at 54 (roll call votes). The bill was subsequently enacted into law. See, 2009 N.D. Sess. Laws Ch. 274, §1.

4. This Court's precedents are clear: if an expert affidavit is not served in conformity with Section 28-01-46, the plain language of the statute requires dismissal

[¶36] The precedents of this Court, at all times since Scheer v. Altru Health System, have been consistent: if any expert affidavit is not served in conformity with the requirements of Section 28-01-46, and if an exception to the affidavit requirement does not apply, "the plain language of N.D.C.C. § 28-01-46 *requires* dismissal." See, e.g., Pierce v. Anderson, 2018 ND 131, ¶12, 912 N.W.2d 291 (emphasis added). "This Court has repeatedly affirmed district court dismissals or summary judgments of professional negligence cases where the plaintiffs failed to file an expert affidavit." Id. at ¶14 (citing Cartwright v. Tong, 2017 ND 146, ¶14, 896 N.W.2d 638; Greene v. Matthys, 2017 ND 107, ¶13–15 , 893 N.W.2d 179; Haugenoe v. Bambrick, 2003 ND 92, ¶11, 663 N.W.2d 175). With the exception of Scheer v. Altru Health System, which has been legislatively reversed, this Court's precedents point in one, unanimous direction: the district court was required to dismiss Plaintiff's lawsuit.

[¶37] Plaintiff's argument that dismissal was not compulsory is unsupported by the case law. Plaintiff repeatedly argues that a substantial-compliance standard should be applied (see, Appellant's Brief at ¶¶38–50), but Defendant's research has not disclosed a single North Dakota case applying a substantial-compliance standard to litigation arising from Section 28-01-46. Clearly, substantial compliance is not the standard, and there are good reasons that it is not.

[¶38] "This Court has consistently noted the importance of an expert affidavit in professional negligence cases." Pierce v. Anderson, 2018 ND 131, ¶12, 912 N.W.2d 291 (citing Johnson v. Mid Dakota Clinic, P.C., 2014 ND 135, ¶11, 864 N.W.2d 269; Haugenoe, 2003 ND 92, ¶¶10–11, 663 N.W.2d 175; Ellefson v. Earnshaw, 499 N.W.2d 112, 114 (N.D. 1993); Heimer v. Privratsky, 434 N.W.2d 357, 359–60 (N.D. 1989); Fortier v. Traynor, 330 N.W.2d 513, 330 N.W.2d 513, 517 (N.D. 1983) ("if we recognize, as we must, that it does not require a genius to draft a complaint it becomes apparent that more is needed than a mere allegation of negligence in a malpractice action"); Winkjer v. Herr, 277 N.W.2d 579, 583 (1979)). It has also recognized that the purpose of the expert-affidavit requirement is to screen "unsupported claims and to prevent protracted litigation when a medical malpractice plaintiff cannot substantiate a basis for the claim."

Pierce v. Anderson, 2018 ND 131, ¶12, 912 N.W.2d 291. Plaintiff's proposed standard of substantial compliance is inconsistent with this Court's precedents. It also does not advance the purposes of deterring and screening unsupportable claims.

[¶39] Plaintiff's argument that this Court should follow out-of-state precedents (see, Appellant's Brief at ¶¶58–65) interpreting different statutes arising from different legislative histories is meritless. While it may be appropriate for this Court consider out-of-state precedents when considering novel issues, the expert affidavit requirements, and the consequences of noncompliance, are firmly-established by this Court's precedents. Therefore, this Court should follow its own precedents and affirm the district court's dismissal of this lawsuit.

5. Plaintiff's invitation to disregard the plain language of the statute under the pretext of following its spirit is plainly improper

[¶40] "If the language of the statute is clear and unambiguous," this Court "cannot ignore that language under the pretext of pursuing its spirit." See, e.g., State ex rel. Clayburgh v. American West Community Promotions, Inc., 2002 ND 98, ¶14, 645 N.W.2d 196. The intent of the Legislature—evidenced by the plain language of the text and the legislative history—is unmistakable. Notwithstanding the clear and unambiguous language of the statute, Plaintiff has repeatedly invited this Court to ignore the statute's language in pursuit of its spirit. See, Appellant's Brief at ¶51–54 (the entire second issue of Appellant's Brief complains that applying the statute, as written, "violates the spirit of the statutory requirements set forth in N.D.C.C. Section 28-01-46"). This is clearly an impermissible mode of argument.

[¶41] Similarly, Plaintiff anticipates certain consequences of the amendment and complains about them. In effect, she argues that the rule of Scheer v. Altru Health System, 2007 ND 104, 734 N.W.2d 778, which allowed extensions to be requested after the three-month period, would make better policy. She expresses concern that the law, as written, promotes gamesmanship. See, Appellant's Brief at ¶48. Such arguments may be addressed to the Legislature, but they are not appropriately addressed to this Court.

[¶42] Based on the foregoing, there can be no question that Plaintiff was required to file the expert affidavit, or request an extension, within the three-month period. Because she did not, the district court dismissal of her lawsuit should be affirmed.

III. Alternatively, if Courts are Deemed to have the Authority to Grant Extensions after the Three-Month Period has Expired, Undisputed Facts in the Record Establish that no "Good Cause"

Existed to Justify Granting an Extension; Therefore, any Error by the District Court was Harmless

[¶43] Alternatively, if courts are deemed to have the authority to grant extensions after the three-month period has expired, the record establishes that no good cause existed to justify granting an extension. The Court found as follows: (1) Defendant did not have a duty to inform Plaintiff of its obligations under Section 28-01-46; (2) Plaintiff was aware of the circumstances preventing her from obtaining an expert affidavit within the three-month period and yet, notwithstanding that knowledge, she inexcusably neglected to request an extension; and (3) the representation by Plaintiff's counsel that they did not "understand the time sequence" of Section 28-01-46 was found to be "disingenuous" and was not good cause to grant an extension. See, id. at 36–37 ¶¶16–18. Additionally, although not acknowledged by the district court, Plaintiff's ignorance, even if believed, would not establish good cause because ignorance of the law is not a defense. Where nothing in the record could support a finding of good cause, any erroring in finding extensions cannot be granted if not requested within the three-month period would be harmless.

A. Burden of proof

[¶44] Assuming *arguendo* that Plaintiff could request an extension after the three-month period ended, Plaintiff would still be required to demonstrate "good cause" for granting the extension. See, § 28-01-46 (expressly conditioning the granting of an extension upon a showing of "good cause"). Section 28-01-46 places the burden of proof on the plaintiff to show good cause. See, Scheer v. Altru Health System, 2007 ND 104, ¶25,743 N.W.2d 778 (legislatively reversed on other grounds).

B. Defendants had no duty to inform Plaintiff of its obligations under Section 28-01-46

[¶45] Plaintiff complains that Defendants "never made a verbal or written demand for Plaintiff to provide an expert affidavit pursuant to N.D.C.C. Section 28-01-46." See, Appellant's Brief: Appellant's Appendix at 18, ¶56. She also complains that "Defendants remained silent on the issue of an expert affidavit until the filing of their motions." Id. Finally, she complains that the scheduling order did not reflect the expert-affidavit deadline. See, id. The suggestion that these circumstances met the standard of "good cause shown" is meritless.

[¶46] The district court correctly recognized that Defendants had no duty to make Plaintiff aware of her obligations under Section 28-01-46. Cf. id. at 36, ¶16 (rejecting the argument because it "failed to recognize" that Plaintiff had the "affirmative duty to establish a prima facie case of professional negligence via expert affidavit"). Defendants' research has not disclosed any North Dakota case imposing such a duty on defendants.

Therefore, the fact that Defendants did not advise Plaintiff to file an expert affidavit is not good cause shown.

C. Plaintiff was aware of the circumstances preventing her from obtaining an expert affidavit within the three-month period; therefore, she could and should have requested an extension within the three-month period, and her neglect in doing so was not excusable

[¶47] Plaintiff argued that "because medical records were not provided in their entirety until the three months had passed," and because "it was necessary to initiate probate proceedings before medical records could be obtained," her neglect in requesting an extension was excusable. The district court correctly rejected this argument because "such situations are precisely the scenarios wherein a request for extension is appropriate." See, Appellant's Appendix at 36, ¶18. Because Plaintiff "elected not to exercise that option," the Court concluded that good cause was not present. See, id. Plaintiff was aware of these circumstances during the three-month period; neglecting to request an extension for eight months is neither reasonable nor good cause shown.

D. Ignorance of the law is not a defense

[¶48] To any extent that Plaintiff was ignorant of the law in North Dakota, that is no defense. "Every person generally is charged with knowledge of the provisions of statutes and regulations and must take notice thereof." Gonzales v. Tounjian, 2003 ND 121, ¶20, 665 N.W.2d 705. "Ignorance of the law or a regulation is no excuse or defense." Id. Therefore, any ignorance on the part of Plaintiff about the requirements of Section 28-01-46 is immaterial.

[¶49] Furthermore, the district court heard argument that Plaintiff did not "appreciate the time sequence" of Section 28-01-46 and found it to be both "disingenuous and contrary" to paragraph 42 of Plaintiff's Complaint, which states: "An admissible expert opinion pursuant to North Dakota Century Code § 28-01-46 has been obtained by Plaintiff to support these allegations." See, id. at 36. Based on the foregoing, the district court concluded: "Thus, it is clear that [Plaintiff] was aware of the expert opinion requirement of N.D.C.C. § 28-01-46 when the action was commenced." Id.

[¶50] Irrespective of whether Plaintiff's attorneys understood how Section 28-01-46 operates, the standard of good cause shown has not been established. Because Plaintiff failed to demonstrate good cause, any hypothetical error in holding extensions cannot be granted after the three-month period was harmless error. The district court dismissal should be affirmed.

E. The Scheduling Order did not extend the three-month deadline in which Plaintiff was required to serve an expert

affidavit, and nothing in the Scheduling Order waived Defendants' right to move for dismissal under Section 28-01-46

[¶51] The Scheduling Order neither explicitly nor implicitly agreed to extend the three-month deadline in which Plaintiff was required to serve an expert affidavit. In Scheer, this Court explained the only circumstances in which a scheduling order would be deemed to "trump" the requirements of Section 28-01-46:

> [A] defendant may agree to a different deadline for the plaintiff to serve the expert affidavit[;] [however] … [a] scheduling order must clearly reflect this agreement and specify the new deadline for serving the expert affidavit. Therefore, a generic scheduling order would not 'trump' section 28-01-46.

Scheer, 2007 ND 104, ¶25,743 N.W.2d 778 (legislatively reversed on other grounds). Because the Scheduling Order in this case was generic, and because it contained no clear or explicit reference to changing the deadline by which the expert affidavit needed to be served, the Scheduling Order did not extend the three-month deadline.

[¶52] Plaintiff's argument that the Scheduling Order was unreasonably misleading is without merit. The Scheduling Order did not address the date on which the affidavit of merit would be served because it did not have to; the statute provided the timeframe in which the affidavit was to be served. The affidavit is not an expert disclosure—it is a condition that must be satisfied for a lawsuit to continue. It is a separate and lesser standard that the requirements for expert disclosure governed by North Dakota Rules of Civil Procedure Rule 26, but it is a requirement to maintain the lawsuit and not be subject to dismissal.

[¶53] In conclusion, this case should be dismissed for failure to serve an affidavit of merit within the statutory-required period.

IV. The Obvious Occurrence Exception has no Application in this Case

[¶54] The "obvious occurrence" exception has no application in connection with the diagnosis, treatment, hospital management, and/or surgical or mechanical protection of spinal injuries. Similarly, it has no application in cases involving exercises of professional judgment connected to neurosurgery and related preoperative and postoperative care.

A. Whether the obvious occurrence exception applies is a mixed question of fact and law; the underlying predicate facts are treated as findings of fact and reviewed under a clearly erroneous standard and the conclusions of law are reviewed de novo

[¶55] A "district court's decision on whether the obvious occurrence exception applies under N.D.C.C. § 28-01-46 is a mixed question of fact and law." See, Pierce v. Anderson, 2018 ND 131, ¶10, 912 N.W.2d 291.

> In reviewing a mixed question of fact and law, the underlying predicate facts are treated as findings of fact, and the conclusion whether those facts meet the legal standard is a question of law.

> Questions of law … are fully reviewable on appeal. Findings of fact must not be set aside unless clearly erroneous. A finding of fact is clearly erroneous under N.D. R. Civ. P. 52(a) if it is not supported by any evidence, if, although there is some evidence to support the finding, the reviewing court is left with a definite and firm conviction a mistake has been made, or if the finding is induced by an erroneous conception of the law.

Id. at ¶11 (internal quotations omitted).

B. The obvious occurrence exception does not apply because the alleged negligence relates to the practice of neurosurgery, the plan of care for a spinal-injury patient, and the risk assessment for this kind of patient are undoubtedly matters outside the knowledge of lay jurors

[¶56] The "obvious occurrence" exception is articulated in Section 28-01-46:

> [The expert-affidavit requirements of Section 28-01-46 do] not apply to unintentional failure to remove a foreign substance from within the body of a patient, or performance of a medical procedure upon the wrong patient, organ, limb, or other part of the patient's body, or other obvious occurrence.

This is a narrow exception providing that "[e]xpert testimony is not required to establish a duty, the breach of which is a blunder so egregious that a layman is capable of comprehending its enormity." Pierce v. Anderson, 2018 ND 131, ¶12, 912 N.W.2d 291 (internal punctuation omitted). "This "'obvious occurrence' exception applies only to cases that are plainly within the knowledge of layperson." Id. "In an 'obvious occurrence' case, expert testimony is unnecessary precisely because a layperson can find negligence without the benefit of an expert opinion." Id. (citing Larson v. Zarrett, 498 N.W.2d 191,194 (1993)).

[¶57] The case law is clear: "cases involving technical surgical procedures are generally beyond the understanding of a layperson" and, therefore, do not fall within the "obvious occurrence" exception. See, e.g., Greene v. Matthys, 2017 ND 107, ¶13, 893 N.W.2d 179. What individualized follow-up care is appropriate for a patient with spinal injuries, who has previously been through surgery, is not within the knowledge of laypersons. It is closely related to the surgery itself, and, under general principles of North Dakota law, should be presumed outside the understanding of laypersons. Cf. Larson v. Zarrett, 498 N.W.2d 191,194 (1993) ("obvious occurrence" exception did not apply because the facts of the case differed "from the statutory examples of leaving a foreign substance within the body or operating on the wrong patient, limb, or organ;" rather, they involved "technical surgical procedures and nerve damage, both of which have been recognized as generally being beyond the understanding of a layperson.")

[¶58] Out-of-state courts have recognized that negligence claims related to preoperative and postoperative care are subject to the same proof requirements as surgical claims. See, e.g., Cox v. Jones, 470 N.W.2d 23, 26 (Iowa 1991) (plaintiff that failed to introduce expert testimony could not prevail on claim of negligent follow-up care; ***the claim necessitated expert testimony regarding the appropriate standard of care***) (emphasis added); Cf. Hurt v. Barrois, 872 So.2d 1191, 1195 (La. 2004) (expert testimony was offered to establish preoperative standard of care). In North Dakota, where an expert witness will be required to establish "the applicable standard of care," this weighs against an occurrence's obviousness. See, Cartwright v. Tong, 2017 ND 146, ¶13, 896 N.W.2d 638 (necessity of expert testimony used to reject "obvious occurrence" argument). Plaintiff, through the Affidavit of Dr. Bloomfield, proposes a standard of care for neurosurgical aftercare, which includes: (a) identifying the risks of falling connected to the patient's spinal injuries, (b) putting appropriate fall-risk precautions into place, and (c) adequately monitoring the patient. Because an expert will be required to establish those standards of care, it cannot be seriously maintained that the "obvious occurrence" exception applies. It also ignores the myriad of factual and alleged negligence allegations contained in Plaintiff's Complaint.

[¶59] This Court has indicated that identifying the risks involved in the provision of medical care "are beyond the common understanding of a layperson." Cf. Cartwright, 2017 ND 146, ¶14, 896 N.W.2d 638 (medical risks associated with surgical procedure deemed beyond the common understanding of laypersons). Whether fall-precautions and decisions to proceed with surgical fusion or to mechanically stabilize were "appropriate," and whether monitoring was "adequate" cannot possibly be answered without resort to a medical standard of care.

[¶60] Finally, Plaintiff cites no case law rebutting the presumption that this case—which involves a technical surgical procedure and its aftercare—is outside the understanding of laypersons. To meet the legal standard of an obvious occurrence, one must show that "the breach is so egregious that a layman is capable of comprehending its enormity." Cf. Cartwright, 2017 ND 146, ¶10, 896 N.W.2d 638. Plaintiff obviously felt that an expert was necessary, since they provided such an opinion outside the time specified in North Dakota Century Code Section 28-01-47, necessitating dismissal as a matter of law.

C. This Court should apply the "obvious occurrence" principles articulated in Pierce v. Anderson and affirm dismissal

[¶61] In Pierce v. Anderson, 2018 ND 131, 912 N.W.2d 291, this Court reversed a district court decision applying the "obvious occurrence" exception. Id. at ¶1. Pierce involved facts far more susceptible to understanding by lay jurors than those in the immediate case. Specifically, the plaintiff's third, fourth, and fifth fingers were injured in an automobile accident. Id. at ¶2. Injury to all three fingers was diagnosed, and the plaintiff consented to surgery on all three fingers. Id. at ¶¶2–3. Notwithstanding the foregoing, the surgeon operated on only the fourth and fifth fingers. Id. at ¶3.

[¶62] This Court held as follows: "the district court should not have applied the obvious occurrence exception … because the alleged occurrence of professional negligence [was] not plainly within knowledge of a lay person, and a layperson could not find negligence without the benefit of expert testimony." Id. at ¶17. This Court acknowledged that "the medical records indicated [the] middle finger was fractured and required repair." Id. It also acknowledged that failure to fix the middle finger necessitated a second surgery. Id. Notwithstanding the foregoing, the Court emphasized the following legal principles:

> (1) For the "obvious occurrence" exception to apply, "the occurrence itself must have been obvious, not the result;"
>
> (2) "Occurrences of alleged professional negligence during technical surgical procedures typically fall outside the obvious occurrence exception;" and
>
> (3) "Determining the appropriate treatment for [the plaintiff's] middle finger, whether by splinting or by a surgical procedure, are matters of diagnosis and treatment not commonly susceptible of understanding by a layperson without the assistance of an expert witness."

Id.

[¶63] A physician not operating on a finger after consent was given is *far* more susceptible to understanding by a lay juror than exactly what fall-risk precautions, surgical or mechanical intervention, and monitoring is necessary for a patient with spinal injuries. *A fortiori*, if the alleged failure to perform surgery on a fractured finger is *not* an "obvious occurrence" susceptible to understanding by lay jurors, then the practice of neurosurgery, the plan of care for a spinal-injury patient, and the risk assessment for this kind of patient are undoubtedly matters outside the knowledge of lay jurors. Under the ruling of <u>Pierce</u>, it would be reversible error for this Court to apply the "obvious occurrence" exception.

[¶64] In <u>Pierce</u>, this Court provided additional guidance; specifically, it employed the *ejusdem generis* rule of statutory construction and interpreted "or other obvious occurrence" very narrowly. First, this Court recognized that Section 28-01-46 "does not apply to unintentional failure to remove a foreign substance from within the body of a patient, or performance of a medical procedure upon the wrong patient, organ, limb, or other part of the patient's body, *or other obvious occurrence*." (Emphasis added). Next, this Court reasoned: "under the rule of *ejusdem generis*, when general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects specifically enumerated." Id. at ¶12. Finally, this Court concluded: allegations of negligent failure to operate on a patient "is not like the failure to remove a foreign substance from the body of a patient or performance of a medical procedure upon the wrong patient, organ, or limb." Id. at ¶17.

[¶65] In so holding, this Court made something very clear: the statutory language "or other obvious occurrence" should be read narrowly; it encompasses only those cases strongly resembling foreign-object cases, wrong-body-part cases, or wrong-patient cases. The immediate case bears no resemblance to these types of cases.

[¶66] Again, if expert testimony is required to establish whether the failure to operate on a finger is negligent—where consent was given to operate on that finger, the other injured fingers were repaired, and the failure to operate necessitated a second surgery—determination of neurosurgical care and monitoring are even less "obvious." Reasonable minds could not differ in concluding that the obvious occurrence exception cannot apply in this case.

V. CONCLUSION

[¶67] For the foregoing reasons, Defendants respectfully request this Court to affirm the district court's dismissal.

RESPECTFULLY SUBMITTED this 5th day of December, 2018.

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