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STATE OF NORTH DAKOTA

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.	Supreme Court No. 20180335 Case No. 51-2017-CV-01665

PLAINTIFF-APPELLANT'S REPLY BRIEF

**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**

**IN DISTRICT COURT, NORTH CENTRAL JUDICIAL DISTRICT,
COUNTY OF WARD, STATE OF NORTH DAKOTA,
THE HONORABLE STACY J. LOUSER, PRESIDING**

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I. ISSUE NO. 1

The Undisputable Facts Show that Plaintiff's Claims are Meritorious and Defendants Cannot Dispute the Fact that N.D.C.C. Section 28-01-46 is Intended to Target Only Frivolous Claims that Warrant Dismissal in the Early Stage of Discovery

¶1. Defendants assert that Plaintiff's Complaint must be dismissed because Defendants did not receive Dr. Bloomfield's expert affidavit within three months of the filing of the Complaint, an argument raised four months after Defendants assert the affidavit was due. It is well-established that if "the language of a statute is ambiguous or if adherence to the strict letter of the statute would lead to injustice or absurdity, the spirit of the law prevails over the literal meaning of the particular language of the statute for purposes of construing the statute to give effect to the legislative intent." Loney v. Grass Lake Public School Dist. No. 3, 322 N.W.2d 470, 472 (1982); Barnes County Education Association v. Barnes County Special Education Board, 276 N.W.2d 247 (N.D.1979).

¶2. Recently, the Supreme Court of North Dakota reiterated that "[i]f 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." State v. Meador, 2010 ND 139, ¶ 11, 785

N.W.2d 886 (quoting State v. Brown, 2009 ND 150, ¶ 15, 771 N.W.2d 267), quoted in Denault v. State, 898 N.W.2d 452, 456, 2017 N.D.167. The dismissal of Plaintiff's meritorious Complaint epitomizes the "absurd" and "ludicrous" result that the North Dakota Supreme Court cautioned against.

¶3. Defendants cite to the Hearing conducted in connection with the statutory amendment. A review of the testimony reveals that those persons in support of the statutory amendment acknowledged that a frivolous case was one without expert opinion to support it and that the statute intended to weed out only frivolous claims. As evidenced in the testimony cited by Defendant as part of the Hearing on H.B. 1302 Before the H. Judiciary Committee, Tracy Kolb, Defense Attorney, testified as follows as to the relevant statute, N.D.C.C. Section 28-01-46:28-01-46 is a statute that provides for a preliminary screening of medical malpractice cases. It's intended to dispose of frivolous cases that cannot be supported by an expert affidavit or an expert witness at the earliest stages of litigation . . . [t]he purpose of the statute is early screening of medical negligence cases that cannot be supported by an expert and avoid unnecessary protracted litigation of a lawsuit that cannot be substantiated by an expert witness. (emphasis added) *Hearing on H.B. 1302 Before the H. Judiciary Comm.*, 61st Assembly (2009) (Statement by Tracy Kolb), (See Appellee Trinity Appendix 47-48)

¶4. When defense counsel Kolb was asked by Rep. Delmore what makes a case "frivolous" Kolb responded that in a medical negligence context, a frivolous case is one that is "not supported by an expert witness . . . by medical expert testimony." *Hearing on*

H.B. 1302 Before the H. Judiciary Comm., 61st Assembly (2009) (See Appellee Trinity Appendix 49). Concerns were also expressed by Representative Griffin, opining that "I don't think there is a problem out there, 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 could file that action." *Hearing on H.B. 1302 Before the H. Judiciary Comm*., 61st Assembly (2009) (See Appellee Trinity Appendix 52). The sole purpose of the requirements set forth in N.D.C.C. § 28–01–46, is to "screen totally unsupported claims and prevent protracted litigation when a medical malpractice plaintiff cannot substantiate a basis for the claim. Van Klootwyk v. Baptist Home, Inc., 2003 ND 112, 665 N.W.2d 679. Dismissal of Plaintiff's Complaint undercuts the statute's stated purpose and unfairly leaves Plaintiff without recourse. The Defendants do not argue that this matter is a frivolous one, unsupported by expert testimony, and acknowledge, as they must, that the statute's intent focuses on the early elimination of frivolous cases and not those having merit such as the one before this Court. Dr. Bloomfield substantiates Plaintiff's claims of negligence, stating that to a reasonable degree of medical probability the Defendants deviated from accepted standards of care proximately causing Mr. Pelkey's injuries. (See Bloomfield Affidavit, Plaintiff's Appendix 23).

¶5. The Defendants assail Plaintiff's representation that Plaintiff was beguiled into the reasonable belief that the Defendants waived their right to object to the affidavit

because of the substance of the Scheduling Order and the circumstance leading up to its execution. The Order is not generic because the Order represents a culmination of the parties' consent to specific discovery deadlines, including expert disclosure timelines. Furthermore, the Plaintiff reasonably relied upon Defendants' suggestion that a court conference was not necessary because the parties agreed upon the exchange of discovery among themselves. Contrary to Defendants' contention, the Court should not ignore the relevant facts that led up to the timing of the service of Dr. Bloomfield's affidavit. Doing so would only encourage this Defendant and others to take unfair advantage of their adversaries under the guise of cooperation during discovery.

¶6. Plaintiff provided the expert affidavit at the earliest possible time which was within six months of filing the Complaint, namely due to the complexity involved in appointment of the Executrix, the hurdles in obtaining medical records, and the reasonable belief that Defendants waived objection to the timing of the expert affidavit, having agreed to disclosure deadlines in the Scheduling Order. The statute was never intended to become a trap for plaintiff's with meritorious claims who have an expert affidavit substantiating the allegations.

¶7. Defendants mischaracterize Plaintiff's argument concerning the Defendants' waiver of their right to object to the expert affidavit. Plaintiff's argument is not that Defendant had a duty to advise Plaintiff of her statutory obligations, but rather, that Defendants' deliberate undertaking to forego the scheduled status conference and their

execution of a Scheduling Order addressing expert deadlines present compelling evidence of conduct constituting waiver. Plaintiff's claim is supported by expert opinion and allowing Plaintiff to prove the merits of her claim comports with the statute's overriding intent.

¶8. This matter is inapposite from frivolous cases that the statute intends to target. It must be emphasized that "the statute requiring an expert affidavit in professional negligence cases was enacted to prevent an actual trial in such cases where a medical malpractice plaintiff cannot substantiate a basis for the claim." Greenwood v. Paracelsus Health Care Corp. of N.D., Inc., 2001 ND 28, 622 N.W.2d 195, quoted in Pierce v. Anderson, 912 N.W.2d 291, 295, 2018 ND 131. This Court has not been stripped of discretion to allow a meritorious case to proceed when the abbreviated delay in serving the expert affidavit was due to the myriad of factors identified here.

¶9. Defendants assert that this Court should not look to the approach of courts outside this jurisdiction because the law is well-established. While the Defendants claim that the issue at hand is not novel, there is no reported decision in North Dakota that addresses the appropriateness of conducting an affidavit of merit pre-trial conference. As such, the issue is in fact novel and Plaintiff directs the Court to the relevant cases cited in Plaintiff's initial brief. See A.T. v. Cohen, 231 N.J. 337 (2017); Ferreira v. Rancocas Orthopedic Assoc., 178 N.J. 144 (2003). The New Jersey Courts have adopted an equitable and commonsense approach, allowing claims to proceed if circumstances, notably a lack of a pre-trial conference, contributed to the timing of the service of the affidavit. See A.T.

v. Cohen, 231 N.J. 337 (2017); Ferreira v. Rancocas Orthopedic Assoc., 178 N.J. 144 (2003).

¶10. Defendants contend that Plaintiff's Complaint is appropriately dismissed because the negligence alleged does not constitute an obvious occurrence. N.D.C.C. § 28–01–46 provides in relevant part that "[t]his section 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." An 'obvious occurrence' case does not require expert testimony because a layperson can find negligence without the benefit of an expert opinion." Larsen v. Zarrett, 498 N.W.2d 191, 195 (N.D. 1993); Cartwright v. Tong, 896 N.W.2d 638, 642 (2017). For the exception to apply, the occurrence that led to the result, not the result itself, must be obvious. Greene v. Matthys, 2017 ND 107, 893 N.W.2d 179. An expert affidavit is not required to establish a duty if the breach is so egregious that a layman is capable of comprehending its enormity. Johnson v. Mid Dakota Clinic, P.C., 2015 ND 135, 864 N.W.2d 269; Johnson v. Bronson, 2013 ND 78, 830 N.W.2d 595); Haugenoe v. Bambrick, 2003 ND 92, ¶ 10, 663 N.W.2d 175. Expert testimony is unnecessary precisely because a layperson can find negligence without the benefit of an expert opinion." Larsen, 498 N.W. at 195 (N.D. 1993).

¶11. Evidence exists in this case to warrant the finding of an obvious occurrence. The failure to implement fall risk precautions and allow Plaintiff to ambulate alone is an obvious occurrence deviation. Plaintiff, a patient with a known fracture of his spinous

process, scheduled for surgery in one week, was permitted to go to the commode without assistance. He fell and suffered quadriplegia.

¶12. The factfinder is fully capable of ascertaining whether a patient in Plaintiff's condition presented a fall risk and whether it was a deviation from the standard of care for Defendants not to implement any fall risk precautions. This matter is inapposite to cases in which expert medical testimony is required to establish the standard of care.

¶13. In Pierce, 912 N.W.2d 291, 2018 ND 131, the Court reversed the district court's finding of an obvious occurrence and in doing so, provided examples of matters in which obvious occurrences were found not to exist: The removal of fallopian tubes versus tying of fallopian tubes was deemed not to be an obvious occurrence, Cartwright, 2017 ND 146, 896 N.W.2d 638; alleged deviation during a hip surgery not an obvious occurrence but one involving a technical procedure beyond the understanding of a layperson, Greene v. Matthys, 2017 ND 107, 893 N.W.2d 179; Ophthalmologist's reliance on factors in the diagnosis and treatment of the plaintiff's glaucoma were not those commonly susceptible of understanding by a lay person without the assistance of expert medical testimony. Winkjer v. Herr, 277 N.W.2d 579, 586-587 (N.D. 1979); Obvious occurrence exception did not apply in allegation involving treatment of compound fracture because open reduction and internal fixation are beyond the understanding of a layperson, Haugenoe, 2003 ND 92, 663 N.W.2d 175. The negligence involved in allowing a spinal cord injury patient to ambulate alone is starkly different than "occurrences of alleged professional negligence during technical surgical procedures [which] typically fall outside the obvious occurrence exception. Pierce, 912 N.W.2d at 298.

CONCLUSION

¶14. For the foregoing reasons, the Plaintiff respectfully requests that this Court reverse the District Court's dismissal of the Plaintiff's Complaint.

Dated this 26th day of December 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the above brief is in compliance with N.D.R. App.P 32(a)(8)(A) and the number of words in the brief, excluding words in the table of contents, table of authorities, signature block, this certificate of compliance, and the certificate of service, does not exceed 2000 words.

DATED this 26th day of December 2018.

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I hereby certify that on the 26th day of December 2018, a true and correct copy of the following document:

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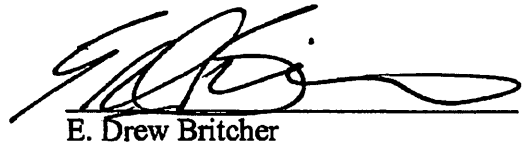

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