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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Margaret Cichos, individually, and as the surviving spouse of Bradley Cichos, and as Personal Representative of the Estate of Bradley Cichos, deceased, Lyman Halvorson, individually, Kenzie Halvorson, individually, Landon and Sierra Halvorson as parents and natural guardians of A.H. DOB 2011, a minor child, collectively as assignees of Lyle Lima, Lyle Lima, individually,

Plaintiffs-Appellants,

vs.

Dakota Eye Institute, P.C., Dakota Eye Institute, LLP, Briana Bohn, O.D., individually,

Defendants-Appellees.

Supreme Court No.: 20180347
Pierce County No.: 35-2018-CV-00033

BRIEF OF APPELLANTS

Appeal from Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss
Dated July 16, 2018
Appeal from Judgment of Dismissal
Dated July 18, 2018
Appeal from Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss
Pursuant to N.D.C.C. 28-01-46
Dated August 16, 2018
In the District Court of Pierce County
The Honorable Donovan Foughty, Presiding

Supreme Court No. 20180347
Pierce County No. 35-2018-CV-00022

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STATEMENT OF THE CASE

[¶1] This is an appeal from the July 16, 2018, Order Granting Motions to Dismiss and of the August 16, 2018, Order Granting Motion to Dismiss Pursuant to N.D.C.C. § 28-01-46. The case centers on whether a medical malpractice claim is assignable, on whether a physician owes a duty to a non-patient third-party, and on the sufficiency and requirement for an expert affidavit in a medical negligence action.

[¶2] Margaret Cichos, individually, and as the surviving spouse of Bradley Cichos, and as Personal Representative of the Estate of Bradley Cichos, deceased, Lyman Halvorson, individually, Kenzie Halvorson, individually, Landon and Sierra Halvorson as parents and natural guardians of A.H. DOB 2011, a minor child, collectively as assignees of Lyle Lima (collectively, "Assignees"), and Lyle Lima, individually (collectively, "Injured Parties") filed suit against Dakota Eye Institute, P.C., Dakota Eye Institute, LLP, and Briana Bohn, O.D., individually, (collectively, "Dakota Eye Institute") alleging claims for negligence and wrongful death.

[¶3] Dakota Eye Institute moved to dismiss the Complaint for failure to state a claim upon which relief can be granted. Dakota Eye Institute later moved to dismiss the Complaint pursuant to N.D.C.C. § 28-01-46. On July 16, 2018, the district court granted both motions to dismiss. On July 18, 2018, the district court entered a judgment of dismissal. On August 7, 2018, the district court partially vacated judgment to reconsider its order granting motion to dismiss. On August 16, 2018, the district court again granted Dakota Eye Institute's motion to dismiss pursuant to N.D.C.C. § 28-01-46. On September 11, 2018, the district court entered a judgment of dismissal. On September 18, 2018, the Injured Parties issued their timely Notice of Appeal.

STATEMENT OF THE FACTS

[¶4] On April 27, 2015, Lyle Lima ("Lima") presented himself to Dakota Eye Institute for an eye exam. Upon completion of the examination, Lima was diagnosed with macular degeneration and determined to be legally blind. Dakota Eye Institute prepared a Certificate of Blindness and showed the Certificate to Lima's spouse (because Lima could not see it), and gave instructions Lima was not legally qualified to drive a vehicle. Lima claims he did not drive, except around his farmyard. On or about April 12, 2016, Lima again presented himself to Dakota Eye Institute for a yearly eye exam. The April 2016 eye exam results showed Lima's vision was below the minimum standards required to operate a vehicle under North Dakota law. Instead of informing Lima he could not legally drive, Dr. Briana Bohn told Lima he could drive with certain restrictions.

[¶5] On May 28, 2016, approximately six weeks after Lima was told he could again drive, Lima struck the Assignees with his vehicle. At the time of the accident, Assignees were passengers in a horse-drawn hay trailer. Upon impact, Lima hit Margaret and Bradley Cichos with the front end and windshield of his pickup, throwing them from the trailer. Margaret Cichos underwent months of extensive medical treatment and therapy for injuries she received as a result of the crash. Bradley Cichos suffered severe blunt force trauma injuries in the collision. He survived for a short time, but died at the scene. A.H. DOB 2011 was also thrown from the trailer and has had to undergo, and will have to further undergo, extensive medical treatments and surgeries for her injuries. Lyman Halvorson and Kenzie Halvorson sustained severe and permanent injuries. Lyle Lima received no personal injury as a result of the eye exam or collision.

[¶6] Assignees brought a claim against Lima for damages resulting from the vehicle collision. Lima could not wholly satisfy the claim brought against him by Plaintiffs. As a compromise between Lima and the Assignees, Lima assigned any and all claims, including his medical

malpractice claim, against Dakota Eye Institute, and any recovery therefrom, to the Assignees. On or about April 9, 2018, the Injured Parties commenced an action against Dakota Eye Institute alleging professional negligence. Injured Parties allege their injuries are a direct and proximate result of Dakota Eye Institute's negligence.

STANDARD OF REVIEW

[¶7] A district court's decision granting a motion to dismiss under N.D.R.Civ.P. 12 (b)(6) is reviewed de novo. See Brandvold v. Lewis & Clark Pub. Sch. Dist. No. 161, 2011 ND 185, ¶ 6, 803 N.W.2d 827. In McColl Farms v. Pflaum, 2013 ND 169, 837 N.W.2d 359, this Court elaborated, stating:

> A motion to dismiss a complaint under N.D.R.Civ.P. 12(b)(6) tests the legal sufficiency of the statement of the claim presented in the complaint. We construe the complaint in the light most favorable to the plaintiff, taking as true the well-pleaded allegations in the complaint. Under N.D.R.Civ.P. 12(b)(6), a complaint should not be dismissed unless it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted. We will affirm a judgment dismissing a complaint for failure to state a claim if we cannot discern a potential for proof to support it.

Id. at ¶ 12 (citing Moseng v. Frey, 2012 ND 220, ¶ 5, 822 N.W.2d 464 (citations and quotations omitted)). A district court's interpretation of law is fully reviewable on appeal. See Cermak v. Cermak, 1997 ND, 187, ¶ 6, 569 N.W.2d 280.

LEGAL ARGUMENT

[¶8] Injured Parties submit the trial court erred in dismissing the Complaint by concluding: (1) Lima's medical malpractice claim cannot be assigned; (2) third-party liability cannot attach to Dakota Eye Institute; and (3) Injured Parties' expert affidavit was deficient under N.D.C.C. § 28-01-46 and Injured Parties are not exempt from the requirement to submit an expert affidavit under the "obvious occurrence" exception to N.D.C.C. § 28-01-46.

I. **Whether the trial court erred in dismissing Assignees' collective claim by concluding Lima's medical malpractice claim cannot be assigned.**

[¶9] Assignees brought a claim "collectively as assignees of Lyle Lima's claim for medical malpractice[.]" Index # 2, ¶ 1; see Index # 2. The trial court dismissed Assignees' collective claim by concluding Lima's medical malpractice claim is a personal injury claim and, therefore, nonassignable. See Index # 44, ¶¶ 10-13. Assignees submit the trial court erred.

A. The trial court erred in dismissing Assignees' collective claim because the assigned claim is not for personal injuries and, even if it were, North Dakota does not prohibit the assignment of personal injury claims.

[¶10] In dismissing Assignees' collective claim, the trial court relied on an opinion from the state of Hawaii and an unpublished opinion from the Superior Court of Connecticut. See Appellants' Appendix, at 024, ¶¶ 11-12 (citing Sprague v. Cal. Pac. Bankers & Ins., LTD., 74 P.3d 12 (Haw. 2003), and Allstate Ins. Co. v. Lerer, No. X03CV950502559S, 2001 WL 85141 (Conn. Super. Ct. Jan. 16, 2001)). Assignees submit the facts in Sprague and Lerer are inapposite to the case at bar. Further, Assignees submit the trial court misapplied the holdings in these authorities in concluding the assigned claim is for personal injuries. The trial court erred in dismissing Assignees' collective claim as an unassignable personal injury claim.

[¶11] Assignees argue the assigned claim is purely for the recovery of monetary damages. In response, the trial court relied on Sprague for the contention economic damages may be purely personal in nature depending on the circumstances of the case. See Appellants' Appendix, at 024, ¶ 12 (citing Sprague, 74 P.3d at 24). In Sprague, the court concluded damages for injury to commercial credit, loss of business opportunities, and injury to reputation were personal and therefore unassignable. See Sprague, 74 P.3d at 24. The issue in Sprague was "not [] an assignment of a claim, but [] the assignment of damages arising from such a claim." Sprague, 74 P.3d at 21. The court in Sprague noted the relevance of this distinction, stating: "Petitioners do

not contest the assignability of the claim in this case, but contend the general damages were personal and therefore unassignable." Id. Since Sprague does not address the assignability of a claim, Assignees submit the trial court erred in relying on Sprague to dismiss Assignees' collective claim.

[¶12] Assignees argue the assigned claim is not for personal injuries but instead for purely economic injuries. The trial court rejected this argument, concluding the assigned claim is for personal injury and, therefore, unassignable. See Appellants' Appendix, at 024, ¶ 13. The trial court analogized Assignees' argument with the unpublished opinion in Lerer, stating: "[t]he plaintiffs in [Lerer] also argued it was not a personal injury but an action to recover monetary loss. The [Lerer] court disagreed . . . ." Appellants' Appendix, at 024, ¶ 12 (citing Allstate Ins. Co. v. Lerer, No. X03CV950502559S, 2001 WL 85141, at *10-11 (Conn. Super. Ct. Jan. 16, 2001)). The Lerer court concluded the claim was an unassignable personal injury action, stating: "***the Complaint here clearly alleges personal injury to [assignor] Claffey***. That such personal injury did not result in physical, but only psychological injury to Claffey, does not make this case, as pled, any less of an action for personal injury." Lerer, 2001 WL 85141, at *11 (emphasis added).

[¶13] Assignees submit the present action is distinguishable from Lerer because the Complaint clearly demonstrates Lima: (1) did not assign a personal injury claim; (2) did assign a purely economic claim for the recovery of monetary damages; and (3) asserts, and maintains his right to pursue, individual claims for his own economic injuries. The Complaint in this action alleges: "Plaintiffs made a claim against Lima which Lima could not wholly satisfy. In a compromise between Lyle Lima and Plaintiffs, Lyle Lima assigned his medical malpractice claim and any recovery therefrom to Plaintiffs." Index # 2, ¶ 14. Lima was defending against a claim brought against him for monetary damages. See id. Lima could not wholly satisfy the claim brought

against him. Id. Accordingly, and to reach a compromise between Lima and the Assignees, Lima assigned his own claim to recover monetary damages to the Assignees. Id. Since the claim brought against Lima was for monetary damages, only the recovery of monetary damages would suffice to reach a compromise of the original claim.

[¶14] The trial court dismissed Assignees' collective claim by concluding "[t]he assignment of the medical malpractice claim is assignment of a personal injury claim and there is no authority to support it." Appellants' Appendix, at 024, ¶ 13. Assignees submit there is no basis under North Dakota law to prohibit the assignment of a personal injury claim. Assignees further submit Lima did not suffer a personal injury and therefore has no personal injury claim to pursue or assign. As set forth below, North Dakota does not prohibit the assignment of personal injury claims. Nevertheless, the assignability of personal injury claims is not the issue here because Lima's injury is purely economic and claims for economic injuries are clearly assignable. Accordingly, the trial court erred in dismissing Assignees' collective claim by concluding it is an unassignable personal injury claim.

[¶15] Before the trial court, Dakota Eye Institute asserted a personal injury claim is not assignable. Dakota Eye Institute supported their assertion with numerous citations to authority, none of which apply North Dakota law.[1] Id. In so doing, Defendants fail to note: "[a] chose in action is generally assignable, if it is the type of claim that would survive the death of the assignor and pass to his or her personal representative, ***and if there is no statutory or contractual provision prohibiting its assignment***." 6 Am. Jur. 2d Assignments § 51 (1999) (emphasis added). There is no North Dakota statute or case law prohibiting assignment of a personal injury claim. North

[1] Significantly, none of the public policy reasons against assignment of personal injury claims exist here because Lyle Lima experienced no physical injury during the exam or as a result of the motor vehicle collision.

Dakota case law establishes the assignability of a chose in action as the rule and nonassignability as the exception. See infra, at ¶¶ 22-24. Even if Lima's claim is for personal injury, which Assignees deny, there is no basis under North Dakota law to prohibit the assignment of such a claim. Id.

[¶16] The trial court concluded Lima's claim is a personal injury claim. See Appellants' Appendix, at 023-024, ¶¶ 10-13. It is not. Assignees dispute characterizing Lima's assigned claim as one for personal injury. Lima suffered no personal injury during the eye exam or as a result of the accident giving rise to this action. Instead, Lima incurred an economic injury as a result of illegal advice from his eye doctor. Since Lima could not wholly satisfy the claims made against him by Assignees, Lima agreed to assign to Assignees his claim against Dakota Eye Institute. A claim for economic damages is assignable. See, e.g., Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 328 (Ariz. Ct. App. 1996).

[¶17] Assignees assert Lima's assigned claim is similar to the assignment of an insurance claim. In Groce v. Fidelity General Inc. Co., 448 P.2d 554 (Or. 1968), the court addressed the assignment of an insurance claim following a vehicle accident which caused both fatal and serious injuries. In Groce, the insured's judgment creditors obtained an assignment of the insured's claim against his insurer for the insurer's failure to settle. See id. The insurer in Groce challenged the assignability of the claim based on public policy reasons of avoiding champerty and maintenance. Id. at 558. The Groce court rejected these public policy arguments, stating:

> [t]o the argument that the assignment of claims in cases of this kind breeds champerty and maintenance, it is sufficient to observe that for many years at common law the bona fide assignee of a chose in action has not been deemed guilty of champerty. Champerty is the intermeddling of a stranger in the litigation of another, for profit, and maintenance is the financing of such intermeddling. ***A judgment creditor of an insolvent tortfeasor can hardly be called an intermeddling stranger to litigation necessary to pay his judgment***.

Groce, 448 P.2d at 558 (internal citations omitted) (emphasis added). Assignees submit the assignment in Groce is comparable with the assignment by Lima. Lima was faced with monetary damage claims which he could not wholly satisfy. Thus, Lima assigned any and all claims, including his medical malpractice claim, and any recovery therefrom to the Assignees. Although judgment was not entered against Lima, he may still be viewed as an "insolvent tortfeasor" who assigns his claim to pay off his "judgment debt." Assignees submit Lima's claim is assignable because it is a claim for the recovery of money and not for personal injury.

[¶18] One of Lima's assigned claims is a medical malpractice claim. Dakota Eye Institute appears to equate a medical malpractice claim with a personal injury tort claim. Assignees submit this correlation of malpractice and personal injury is misleading and contrary to the accepted definition of "malpractice."

[¶19] "[M]alpractice is a professional's failure to exercise the requisite degree of skill and learning in providing services. Simply stated, malpractice means professional negligence." Jilek v. Berger Elec., Inc., 441 N.W.2d 660, 661 (N.D. 1989) (internal citations omitted). "'[M]alpractice in the statutory sense describes the negligence of a professional toward the person for whom he rendered a service, and . . . an action for malpractice springs from the correlative rights and duties assumed by the parties through the relationship.'" Sime v. Tvenge Associates Architects & Planners, P.C., 488 N.W.2d 606, 610 (N.D. 1992) (citing Cubito v. Kreisberg, 69 A.D.2d 738, 419 N.Y.S.2d 578, 580 (1979)). "Medical malpractice is further defined as the 'unwarranted departure from generally accepted standards of medical practice resulting in injury to a patient, ***including all liability-producing conduct arising from the rendition of professional medical services***.'" Grossman v. Barke, 868 A.2d 561, 566 (Pa. Super. Ct. 2005) (quoting

Toogood v. Owen J. Rogal, D.D.S., P.C., 573 Pa. 245, 824 A.2d 1140, 1145 (2003)) (emphasis added).

[¶20] Under North Dakota law, the term "malpractice" is defined without mention of personal injury, and the occurrence of personal injury is not a condition to allege malpractice. See, e.g., Sime, 488 N.W.2d 606 (N.D. 1992); Jilek, 441 N.W.2d 660 (N.D. 1989); Johnson v. Haugland, 303 N.W.2d 533 (N.D. 1981); see also N.D.C.C. § 28-01-18(3) (providing a two-year statute of limitations in "[a]n action for the recovery of damages resulting from malpractice" with no requirement as to the type of damages or predicate injury). Other jurisdictions define "malpractice" in similar fashion as essentially "professional negligence" without restricting malpractice claims by the type of the resultant harm. See, e.g., Grossman, at 566 (defining "medical malpractice" to include "***all liability-producing conduct***") (quoting Toogood, 824 A.2d at 1145 (Pa. 2003) (emphasis added)). Assignees submit there is no basis to require a showing of personal injuries in a claim for medical malpractice. Therefore, the trial court's conclusion Lima's assigned claim is a non-assignable personal injury tort is without merit.

B. The trial court erred in dismissing Assignees' collective claim because the assigned claim is a fully assignable chose in action to recover monetary damages from Dakota Eye Institute.

[¶21] The trial court concluded Lima's assigned claim is a non-assignable personal injury tort claim. Assignees have argued, above, Lima suffered no personal injury as a result of Dakota Eye Institute's conduct. Instead, Lima's assigned claim is to recover monetary damages incurred after Lima, relying on Dr. Bohn's opinion, drove a vehicle and collided with the Assignees causing serious injury and death. Assignees' claims against Lima would not have occurred but for the vehicle collision, and Assignees assert the collision would not have occurred but for Dakota Eye Institute's malpractice by instructing Lima he could drive despite not meeting the minimum vision

requirements under North Dakota law. Thus, Lima's assigned claim is purely for the recovery of monetary damages. As demonstrated below, an action to recover money damages is an assignable chose in action.

[¶22] "The right to bring an action or recover a debt or money is a chose in action . . . ." In re Guardianship of V.A.M., 2015 ND 247, ¶ 17, 870 N.W.2d 201. "[A] 'chose in action' is a legal claim or a right to bring an action to receive or recover a debt, money, or damages by a judicial proceeding . . . ." Id. (citing 73 C.J.S. Property § 12 (2015)). "***Generally, a person may assign a legal claim or a chose in action***." In re Guardianship of V.A.M., 2015 ND 247, ¶ 17, 870 N.W.2d 201 (emphasis added). "The common law rule which denied the validity of an assignment of a chose in action has been modified so that, under the 'modern rule,' ***the assignability of things in action is the rule and nonassignability the exception***." Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly, 268 N.W.2d 762, 764 (N.D. 1978) (emphasis added).

[¶23] Lima's claim against Dakota Eye Institute is for medical malpractice. Lima's medical malpractice claim is not for personal injuries. Lima's claim is not for injury to his eyes, his body, or his physical or mental health. Lima's claim is to recover monetary damages resulting from the malpractice of Lima's eye doctor. Assignees contend Dr. Bohn's exam revealed Lima's vision was not within the minimum required by law. Despite this diagnosis and a prior Certificate of Blindness issued by the same clinic, Dr. Bohn permitted Lima to operate a motor vehicle which led to a collision that killed one person and seriously injured four others. Lima was subsequently sued by Assignees to recover for their loss. Lima's injury is purely economic as is his claim against Dakota Eye Institute. A claim to recover monetary damages is a chose in action and "a person may assign a legal claim or a chose in action." In re Guardianship of V.A.M., 2015 ND 247, ¶ 17,

870 N.W.2d 201. Accordingly, the trial court erred in dismissing the Complaint by concluding Lima's assigned claim is a non-assignable personal injury tort claim.

II. Whether the trial court erred in dismissing the Injured Parties' individual claims by concluding third-party liability cannot attach to the Dakota Eye Institute.

[¶24] In the Complaint, the Injured Parties allege claims individually, and collectively as assignees of Lyle Lima's claim for medical negligence. The trial court stated: "[a]s individual claims are made in the Complaint, this Court must now determine whether third-party liability can attach to Defendants. . . . [T]his appears to be an issue of first impression in North Dakota." Appellants' Appendix, at 025, ¶ 15. The trial court, relying almost exclusively on a single opinion from the state of Pennsylvania, concluded third-party liability cannot attach to Dakota Eye Institute because Injured Parties were not foreseeable victims. See Appellants' Appendix, at 025-026, ¶¶ 14-18 (citing Estate of Witthoeft v. Kiskaddon, 733 A.2d 623 (Pa. 1999)). Injured Parties argue the trial court's reliance on Witthoeft fails to fully consider holdings from other jurisdictions on the issue of third-party liability.

[¶25] The trial court recognized a jurisdictional split on the issue of third-party liability under factual scenarios similar to this case. See Appellants' Appendix, at 025, ¶ 16. In so doing, the trial court cited only four cases, two of which are from the same jurisdiction. Id. Injured Parties submit the trial court's jurisdictional analysis of third-party liability in medical negligence actions was too limited and failed to adequately address authority from a plurality (and growing) of jurisdictions allowing third-party liability in such cases.

[¶26] The Injured Parties' third party claim has been recognized in multiple jurisdictions. In 2015, in a case almost identical to this one, the Court of Appeals of New York allowed a third party medical negligence claim to be brought. See Davis v. South Nassau Communities Hosp., 46 N.E.3d 614 (N.Y. 2015). In Davis, the court held an injured third party can assert a claim against

a doctor and medical facility in which no physician-patient relationship existed between the third party and physician. Id. The Davis court recognized, in limited circumstances, physicians owe third parties a duty of care. Id. The court in Davis noted support for its conclusion in seventeen other jurisdictions. Id. at 622 n.4 (citing Taylor v. Smith, 892 So.2d 887 (Ala. 2004), holding the duty of care owed by the director of a methadone-treatment center to his patient extends to third-party motorists who are injured in a foreseeable automobile accident, resulting from the director's administration of methadone to the patient who was driving; McKenzie v. Hawai'i Permanente Med. Group, Inc., 47 P.3d 1209 (Haw. 2002), ruling a physician owes a duty to non-patient third parties to warn patients of possible adverse effects of prescribed medication on their ability to safely operate a motor vehicle, where the reasonable patient could not have been expected to be aware of the risk without the physician's warning; Joy v. Eastern Maine Med. Ctr., 529 A.2d 1364 (Me. 1987), concluding a physician who treated a patient by placing a patch over one of the patient's eyes owed a duty to motorists to warn the patient against driving while wearing the patch; Welke v. Kuzilla, 375 N.W.2d 403 (Mich. 1985), determining that a physician who injected a patient with an unknown substance owed a duty to a third-party motorist within the scope of foreseeable risk, by virtue of the physician's special relationship with the patient; Wilschinsky v. Medina, 775 P.2d 713 (N.M. 1989), concluding that physicians who inject a patient with drugs known to affect judgment and driving ability have a duty to the driving public; Zavalas v. State Dept. of Corr., 861 P.2d 1026 (Or. 1993), rejecting the contention that a physician has no duty to third parties who claim that the physician's negligent treatment of a patient was the foreseeable cause of their harm; Gooden v. Tips, 651 S.W.2d 364 (Tex. Ct. App. 1983), holding that under proper facts a physician can owe a duty to use reasonable care to protect the driving public where the physician's negligence in diagnosis or treatment of his patient contributes to plaintiff's injuries;

Schuster v. Altenberg, 424 N.W.2d 159, 166 (Wis. 1988), rejecting the contention a psychotherapist has no duty to warn third parties; Cheeks v. Dorsey, 846 So.2d 1169 (Fla. Dist. Ct. App. 2003), distinguishing a mere failure to warn from an affirmative act of failing to take proper precautions where the physician has administered a drug which, when combined with other drugs or alcohol, may severely impair the patient; Medina v. Hochberg, 987 N.E.2d 1206 (Mass. 2013) acknowledging Massachusetts had previously concluded that a physician may be liable to a third party for failing to warn his or her patient of the known side effects of medication prescribed by the physician might affect the patient's ability to drive a motor vehicle; Hardee v. Bio–Medical Applications of South Carolina, Inc., 636 S.E.2d 629 (S.C. 2006), finding a medical provider who provides treatment which it knows may have detrimental effects on a patient's capacities and abilities owes a duty to prevent harm to patients and to reasonably foreseeable third parties by warning the patient of the attendant risks and effects before administering the treatment; Burroughs v. Magee, 118 S.W.3d 323 (Tenn. 2003), holding the defendant physician owed a duty of care to third-party motorists to warn a patient of the physician of the possible adverse effect of two prescribed drugs on (the patient's) ability to safely operate a motor vehicle; Hoehn v. United States, 217 F.Supp.2d 39 (D.D.C.2002), deeming viable a claim that a hospital or physician owes a duty to the general public to warn a heavily medicated patient about the danger of driving; Osborne v. United States, 211 W.Va. 667, 669, 567 S.E.2d 677, 679 (W.Va. 2002), recognizing that West Virginia law permits a third party to bring a cause of action against a health care provider for foreseeable injuries proximately caused by the health care provider's negligent treatment of a tortfeasor patient; Cram v. Howell, 680 N.E.2d 1096 (Ind. 1997), concluding the defendant physician had a duty of care to take reasonable precautions in monitoring, releasing, and warning his patient for the protection of unknown third persons potentially jeopardized by the patient's

driving upon leaving the physician's office where the physician allegedly administered certain immunizations or vaccinations caused the patient to experience episodes of loss of consciousness; Myers v. Quesenberry, 144 Cal.App.3d 888, 890, 894, 193 Cal.Rptr. 733, 733, 736 (Cal. Ct. App. 1983), concluding third-party liability may be imposed against two physicians for failure to warn their patient of consequences of driving or engaging in other activities while taking medicine causing drowsiness; Kaiser v. Suburban Transp. Sys., 398 P.2d 14 (Wash. 1965), concluding whether the defendant doctor was negligent in failing to warn the patient bus driver that a prescribed drug could cause drowsiness was for a trier of fact).

[¶27] The Davis case involved a patient who was treated by a physician and given medications with known disorienting effects. See Davis, 46 N.E.3d at 622. The physician failed to warn the patient of the medication's side effects. Id. After leaving the hospital while still under the effect of the medication, the patient became disoriented, crossed a double yellow line and crashed into a third person. Id. The court in Davis extended beyond the physician-patient relationship to a third party because the physician was in the best position to protect against the risk of harm. Id. at 622.

[¶28] The holding in Davis is also consistent with the Restatement (Second) of Torts § 315 (1965)[2], which provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless:
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

[2] The North Dakota Supreme Court cited Section 315 of the Restatement (Second) of Torts in Saltsman v. Sharp, 2011 ND 172, ¶ 8, 803 N.W.2d 553. The Court refused to apply third-party liability in that case because there was no requirement imposing a duty on the landlord to protect a person from the negligence of another. Id. Here, the administrative code provides minimum vision requirements to operate a motor vehicle.

Id. In Hansen v. Scott, 2002 ND 101, 645 N.W.2d 223, this Court expounded on Section 315 of the Restatement (Second) of Torts, stating "[e]very person has a duty to act reasonably to protect others from harm." Id. at ¶ 24 n.1 (quoting Barsness v. General Diesel & Equip. Co., Inc., 383 N.W.2d 840, 845 n.5 (N.D. 1986)).

[¶29] The present case is analogous to Davis and on point with the Restatement (Second) of Torts. Lyle Lima was diagnosed with macular degeneration, an eye condition that causes vision to become worse over time. In 2015, a certificate of blindness was placed in Lima's file and shown to his wife. See Appellants' Appendix, at 008, ¶ 18. Lima's wife was instructed he could not drive because he did not meet the minimum vision requirements to operate a motor vehicle under North Dakota Law. Id. One year later, in April 2016, Dr. Briana Bohn performed an examination of Lima in which Lima's vision did not meet the minimum requirements under North Dakota law. Id. at ¶¶ 19-22. Unfortunately, Dr. Bohn instructed Lima he could drive. Id. Dr. Bohn's unlawful instruction caused the accident and injuries to the Injured Parties.

[¶30] Injured Parties submit the greater weight of authority supports the conclusion Dakota Eye Institute owed a duty to the Injured Parties. Despite the volume of case law on this issue, the trial court appears to base its denial of third-party liability on a single court opinion. See Appellants' Appendix, at 025-026, ¶¶ 14-18 (trial court noting four opinions as demonstrative of a jurisdictional split, yet quoting and relying exclusively on Estate of Witthoeft v. Kiskaddon, 733 A.2d 623 (Pa. 1999) in refusing to extend third-party liability by concluding Injured Parties were not foreseeable victims). The court below relies on Witthoeft because of its factual similarity to the case at bar. Id., at 025-026, ¶¶ 17-18. Injured Parties submit the court erred in concluding third-party liability cannot attach to the Dakota Eye Institute exclusively based on Witthoeft and its factual similarities to the present action.

[¶31] Injured Parties cite Davis v. Nassau Communities Hosp., 46 N.E.3d 614 (N.Y. 2015) to argue Dakota Eye Institute owed a duty to the Injured Parties to warn Lima of his impaired ability to operate an automobile. In finding third-party liability the court in Davis, while recognizing support for their conclusion in other jurisdictions, explained their decision by noting:

> our decision herein is not grounded in those foreign authorities inasmuch as our result is the product not of "vote counting" but of our independent balancing of factors including the expectations of the parties and of society, the proliferation of claims, and public policies affecting the duty we now recognize[.]

Davis, 46 N.E.3d at 622 n.4 (citation omitted). By contrast, the trial court here gave a cursory review of foreign case law, adopted and applied the holding in Witthoeft because of its factual similarities to the case at bar, and rendered a decision without incorporating North Dakota law. Although the present action is a case of first impression in North Dakota, the Injured Parties respectfully submit the trial court ignored existing North Dakota law and instead simply adopted a holding derived from a set of facts most similar to the present action.

[¶32] Injured Parties submit the trial court's decision to apply Witthoeft in denying third-party liability is further suspect given the strong dissent in Witthoeft. In addressing the policy reasons for imposing a duty on a physician, and in recognizing the imminent threat to health, the dissent in Witthoeft states:

> [t]he majority observes that because this case, unlike DiMarco [v. Lynch Homes-Chester County, Inc., 583 A.2d 422 (Pa. 1990)], does not involve a "communicable disorder or a disorder of imminent threat to health," it does not implicate the policy issues present in DiMarco. ***I find this reasoning unpersuasive, especially when the facts of this case demonstrate that a person who drives when he or she is severely visually impaired can kill another motorist or pedestrian***. Thus, although poor vision may not be a communicable disease, ***I cannot agree with the majority that poor vision in circumstances such as these should not be considered an imminent public health risk. In both cases, the doctor's failure to comply with his statutory duty created an immediate clear and present danger to third parties***.

Witthoeft, 733 A.2d at 632 (Nigro, J., dissenting) (emphasis added).

[¶33] Relying on Witthoeft, the court in this action found: "Lima was in the best position to know whether he had the ability to safely drive." Appellants' Appendix, at 026, ¶ 18. The Injured Parties maintain the proper conclusion on this issue is found in the dissent in Witthoeft, which states in part:

> I also cannot agree with the majority's conclusion that DiMarco is distinguishable from this case because Ms. Myers did not rely on erroneous advice given by Dr. Kiskaddon but rather was "in the best position to know the effects, if any, that her visual acuity would have on her driving." Although Ms. Meyers most likely realized that her vision was failing, I can only assume that Ms. Meyers went to her eye doctor, as a specialist, seeking information and advice regarding her visual acuity. ***Since ophthalmology is Dr. Kiskaddon's specialty, it would seem to me that he, and not Ms. Meyers, was in the best position to understand the effects of Ms. Myers' poor visual acuity on her driving***.

Witthoeft, 733 A.2d at 632 (Nigro, J., dissenting) (emphasis added). This analysis is comparable to North Dakota's dram shop laws. No one would argue against liability for a bar owner by claiming his drunken patron was in the best position to know whether he had the ability to safely drive. Likewise, a nearly blind man should not be the determiner of his own ability to safely drive.

[¶34] Moreover, the suggestion Lima was in the best position to know his visual impairment is illogical because the prior facts of this case are markedly different than those existing in Witthoeft. On April 27, 2015, Lima was diagnosed as legally blind and issued a Certificate of Blindness. He was told he could not drive and did not. On April 12, 2016, Lima had an eye exam for his degenerative eye condition at the same clinic. Dr. Briana Bohn's exam revealed Lima's vision was not within the minimum required to legally drive ***at all***. Despite the result of her exam, Dr. Bohn told Lima he could drive with limitations. On this record it was error for the trial court to conclude Lima was in the best position to know whether he could safely drive.

[¶35] The trial court found: "Plaintiffs [Injured Parties] were not foreseeable victims." Appellants' Appendix, at 026, ¶ 18. The trial court provides no basis for this finding other than it

agrees with the finding in Witthoeft. See id., at 025-026, ¶¶ 14-18. As set forth below, the greater weight of authority supports a finding the Injured Parties were foreseeable victims.

[¶36] In Joy v. Eastern Maine Medical Center, 529 A.2d 1364 (Me. 1987), the court concluded a physician who treated a patient by placing a patch over one of the patient's eyes owed a duty to motorists to warn the patient against driving while wearing the patch. The Joy court found: "***when a doctor knows, or reasonably should know that his patient's ability to drive has been affected, he has a duty to the driving public as well as to the patient to warn his patient of that fact***." Joy, 529 A.2d at 1366 (emphasis added). In addition to Maine (Joy, 529 A.2d 1364 (Me. 1964)) and New York (Davis, 46 N.E.3d 614 (N.Y. 2015)), at least sixteen other jurisdictions have similarly found a physician owes a duty to third parties for the physician's failure to warn his patient not to drive. See Davis v. Nassau Communities Hosp., 46 N.E.3d 614, 622 n.4 (N.Y. 2015); see also supra ¶ 27.

[¶37] The aforementioned case law is specific to a physician's duty to third parties in the context of a patient's operation of a vehicle. Id. While the cases are applicable to the present action due their factual similarities, Injured Parties submit the extension of a physician's duty to third parties has greater application when viewed outside the limited context of failure to warn a patient in his operation of a vehicle. Injured Parties therefore argue the extension of third-party liability is neither unprecedented nor improper. Other jurisdictions have found a physician's duty to third parties by applying principles of tort law and balancing public policy concerns. Id. Here, the trial court failed to apply principles of law in concluding the Injured Parties were not foreseeable victims, and instead reached its conclusion by arbitrarily adopting the Supreme Court of Pennsylvania's conclusions in Witthoeft. See Appellants' Appendix, at 025-026, ¶¶ 14-18;

compare id. with Estate of Witthoeft v. Kiskaddon, 733 A.2d 623, 632 (Pa. 1999). Injured Parties submit the trial court erred.

III. Whether the trial court erred in dismissing the Complaint pursuant to N.D.C.C. § 28-01-46.

A. The trial court erred in dismissing the Complaint on the grounds the Injured Parties' expert affidavit lacks the requisite declarations pursuant to N.D.C.C. § 28-01-46.

[¶38] Dakota Eye Institute moved the trial court to dismiss the Complaint on the grounds "Plaintiffs failed to serve an affidavit containing an admissible expert opinion to support a prima facie case of medical negligence as required under N.D.C.C. § 28-01-46." Index # 39, ¶ 1; see Index # 40. The Injured Parties opposed the motion to dismiss, arguing N.D.C.C. § 28-01-46 does not require the Injured Parties establish a prima facie case of medical negligence against Dakota Eye Institute. The trial court concluded the Injured Parties' "[expert] affidavit clearly does not 'support a prima facie case of medical negligence' as required by N.D.C.C. § 28-01-46." Appellants' Appendix, at 034, ¶ 12. For the reasons stated below, Injured Parties submit the trial court erred in dismissing the Complaint by applying a heightened standard for an admissible expert affidavit beyond what is required by the text of N.D.C.C. § 28-01-46.

[¶39] In moving the trial court to dismiss the Complaint pursuant to N.D.C.C. § 28-01-46, Dakota Eye Institute argued: "[a] prima facie case of medical negligence requires expert evidence '***establishing*** the applicable standard of care, violation of that standard, and a causal relationship between the violation and the harm complained of.'" Index # 40, ¶ 6 (citing Pierce v. Anderson, 2018 ND 131, ¶ 12, 912 N.W.2d 291; Winkjer v. Herr, 277 N.W.2d 579, 583 (N.D. 1979) (emphasis added). In granting Dakota Eye Institute's Motion to Dismiss pursuant to N.D.C.C. § 28-01-46, the trial court relied on this Court's opinion in Pierce v. Anderson, 2018 ND 131, 912 N.W.2d 291, in finding: "[t]o establish a prima facie case of medical negligence, a plaintiff must

produce 'expert evidence ***establishing*** the applicable standard of care, violation of that standard, and a causal relationship between the violation and the harm complained of.'" Appellants' Appendix, at 033, ¶ 9 (citing Pierce, 2018 ND 131, ¶ 12, 912 N.W.2d 291) (emphasis added).

[¶40] Injured Parties submit the trial court's application of Pierce erroneously elevates the standard for an affidavit containing an admissible expert opinion under N.D.C.C. § 28-01-46 by requiring the affidavit establish a prima facie case of medical negligence. Section 28-01-46, N.D.C.C., requires: "the plaintiff serve[] upon the defendant an affidavit containing an admissible expert opinion ***to support*** a prima facie case of professional negligence . . . ." N.D.C.C. § 28-01-46 (emphasis added). In interpreting the requirements of N.D.C.C. § 28-01-46, this Court has stated: "***[t]he expert affidavit must support a prima facie case for professional negligence***, which we have defined as: 'expert evidence establishing the applicable standard of care, violation of that standard, and a causal relationship between the violation and the harm complained of.'" Scheer v. Altru Health Systems, 2007 ND 104, ¶ 18, 734 N.W.2d 778 (citing Van Klootwyk v. Baptist Home, 2003 ND 112, ¶ 20, 665 N.W.2d 679) (citing Larsen v. Zarrett, 498 N.W.2d 191, 192 (N.D. 1993)) (emphasis added). "***The statute [N.D.C.C. § 28-01-46] does not require the plaintiff . . . to establish a prima facie case during the accelerated three-month time frame***, but merely requires the plaintiff to come forward with an expert opinion to support the allegations of malpractice." Van Klootwyk, 2003 ND 112, ¶ 10, 665 N.W.2d 679 (citing Ellefson v. Earnshaw, 499 N.W.2d 112, 114 (N.D. 1993) (emphasis added).

[¶41] Injured Parties submit the trial court erroneously applied the standard under N.D.C.C. § 28-01-46 in applying additional requirements beyond the text of the statute for an admissible expert affidavit, namely the affidavit must establish a prima facie case of medical negligence. Clearly, N.D.C.C. § 28-01-46 requires an expert affidavit to support, not establish, a prima facie

case for professional negligence. See e.g., Scheer, 2007 ND 104, 734 N.W.2d 778; Van Klootwyk, 2003 ND 112, 665 N.W.2d 679; Larsen v. Zarrett, 498 N.W.2d 191, 192 (N.D. 1993). Injured Parties contend the trial court deviated from the standard set forth in N.D.C.C. § 28-01-46 in dismissing the Complaint on the grounds the Injured Parties' expert affidavit lacks the requisite declarations.

B. The trial court erred in refusing to allow the Injured Parties leave to rehabilitate their expert affidavit.

[¶42] Injured Parties contend their expert affidavit meets the requirements set forth in N.D.C.C. § 28-01-46 and argue the trial court erred in dismissing the Complaint by applying a heightened standard for an admissible expert affidavit beyond what is required by the text of N.D.C.C. § 28-01-46. See supra ¶¶ 36-39. However, if Injured Parties' expert affidavit is invalid, then the court erred in refusing to allow the Injured Parties leave to rehabilitate their expert affidavit.

[¶43] Section 28-01-46, N.D.C.C., provides for an extension for the plaintiff to serve the expert affidavit upon a showing of good cause by the plaintiff. See N.D.C.C. § 28-01-46; see also Scheer v. Altru Health Systems, 2007 ND 104, ¶ 20, 734 N.W.2d 778. Section 28-01-46, N.D.C.C., states in part: "[t]he 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.C.C. § 28-01-46. "After the expiration of the three-month period - absent an extension - the case is eligible for dismissal without prejudice. As the plain language provides, the statute's dismissing effect is triggered by the defendant's motion to dismiss." Scheer, 2007 ND 104, ¶ 22, 734 N.W.2d 778. "If the plaintiff shows good cause for an extension prior to the court's ruling on the defendant's motion to dismiss . . . [t]he court could either deny the motion to dismiss and grant the plaintiff more time to file the expert affidavit or dismiss the case . . . ." Id. at ¶ 24.

[¶44] At the court below, Injured Parties argued the trial court should allow Injured Parties leave to rehabilitate the affidavit, instead of dismissing the action. In Johnson v. Bronson, the district court concluded plaintiff's expert affidavit failed to satisfy the requirements of N.D.C.C. § 28-01-46. See Johnson v. Bronson, 2013 ND 78, ¶ 14, 830 N.W.2d 595. Instead of granting defendant's motion to dismiss, the district court in Johnson v. Bronson "allowed Johnson to 'rehabilitate her affidavit and compliance with N.D.C.C. § 28-01-46.'" Johnson v. Bronson, 2013 ND 78, ¶ 14, 830 N.W.2d 595.

[¶45] Injured Parties requested leave to rehabilitate their expert affidavit because, according to the trial court, it was not in compliance with N.D.C.C. § 28-01-46. In contrast to the district court in Johnson v. Bronson, the trial court here did not grant the Injured Parties leave because: "[Injured Parties] have not outlined good cause, nor made any argument as to a timely request." Appellants' Appendix, at 034, ¶ 13. Injured Parties submit their request was timely because it was made in response to Dakota Eye Institute's Motion to Dismiss Under N.D.C.C. § 28-01-46. See Scheer v. Altru Health Systems, 2007 ND 104, ¶ 26, 734 N.W.2d 778 (stating: "the latest a plaintiff could show good cause would be in response to the defendant's motion to dismiss.") Injured Parties further submit good cause for an extension to serve the expert affidavit was shown by the Injured Parties' request for leave to rehabilitate the affidavit in accordance with the authority cited by the trial court in support of its causal relationship position. Good cause existed because the Injured Parties were required to meet a heightened standard for an admissible affidavit under N.D.C.C. § 28-01-46, which standard was imposed by the trial court. If Injured Parties are required to meet a higher standard than what is set forth by the applicable statute, then good cause exists to allow the Injured Parties additional time to meet this heightened standard. Injured Parties submit their

request for leave to rehabilitate their expert affidavit was both timely and supported by good cause. The trial court erred in refusing to allow it.

C. The trial court erred in failing to consider the "obvious occurrence" exception to the requirement of an expert affidavit under N.D.C.C. § 28-01-46.

[¶46] Injured Parties argued before the trial court an expert affidavit is not required in this case under the "obvious occurrence" exception to N.D.C.C. § 28-01-46. In granting Dakota Eye Institute's Motion to Dismiss Under N.C.C.C. § 28-01-46, the trial court failed to address the "obvious occurrence" exception as argued by the Injured Parties. See Appellants' Appendix, at 032-034. Accordingly, Injured Parties submit the trial court erred in failing to consider an expert affidavit is not required pursuant to the "obvious occurrence" exception to N.D.C.C. § 28-01-46.

[¶47] Under N.D.C.C. § 28-01-46, an expert affidavit is not required if the injury is an obvious occurrence. See N.D.C.C. § 28-01-46; see also Scheer v. Altru Health Systems, 2007 ND 104, ¶ 20, 734 N.W.2d 778. "In an 'obvious occurrence' case, expert testimony is unnecessary precisely 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). "[E]xpert testimony is not necessary 'to establish a duty, the breach of which is a blunder so egregious that a layman is capable of comprehending its enormity.'" Id. at p. 192 (citing Arneson v. Olson, 270 N.W.2d 125, 132 (N.D. 1978)).

[¶48] Injured Parties submit an expert affidavit is not required under the "obvious occurrence" exception to N.D.C.C. § 28-01-46. The injury here is an obvious occurrence because a patient with a degenerative eye condition, previously given a Certificate of Blindness by the same institution, was told he could drive despite not meeting minimum statutory vision requirements. This is a blunder so egregious a layman is capable of comprehending its enormity. In granting Dakota Eye Institute's Motion to Dismiss, the trial court failed to address the "obvious occurrence" exception. See Appellants' Appendix, at 032-034. The trial court made no findings or conclusions

as to whether the injury is an obvious occurrence and, therefore, excepted from the requirement of an expert affidavit under N.D.C.C. § 28-01-46. Id. Accordingly, the trial court erred by not considering the "obvious occurrence" exception to the statute.

CONCLUSION

[¶49] For the reasons set forth herein, Appellants Margaret Cichos, individually and as representative of the estate of Bradley Cichos, Lyman Halvorson, individually, Kenzie Halvorson, individually, Landon and Sierra Halvorson as parents and natural guardians of A.H. DOB 2011, each individually and collectively as assignees of Lyle Lima's claim for medical malpractice, and Lyle Lima, individually, respectfully requests this Court REVERSE the trial court's July 18, 2018 Judgment of Dismissal and the trial court's September 11, 2018 Judgment of Dismissal in their entirety and REMAND this case for further proceedings.

[¶50] DATED January 18, 2019.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Margaret Cichos, individually, and as the surviving spouse of Bradley Cichos, and as Personal Representative of the Estate of Bradley Cichos, deceased, Lyman Halvorson, individually, Kenzie Halvorson, individually, Landon and Sierra Halvorson as parents and natural guardians of A.H. DOB 2011, a minor child, collectively as assignees of Lyle Lima, Lyle Lima, individually, Plaintiffs-Appellants, vs. Dakota Eye Institute, P.C., Dakota Eye Institute, LLP, Briana Bohn, O.D., individually, Defendants-Appellees.	Supreme Court No.: 20180347 Pierce County No.: 35-2015-CV-00033

CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA

ss

COUNTY OF RAMSEY

[¶1] I hereby certify that on January 23, 2019, I served the following documents, via electronic mail:

1. Brief of Appellants (Revised as a pdf);
2. Brief of Appellants (Revised in Word); and
3. Appendix (Revised)

[¶2] The copies of the foregoing were securely sent via electronic mail to the address as follows:

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[¶3] DATED January 24, 2019.

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