20180347
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 25, 2019
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** Civil No. 35-2018-CV-00033

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

BRIEF OF DEFENDANTS-APPELLEES

Tracy Vigness Kolb, ND ID #05338
MEAGHER & GEER, P.L.L.P.
1900 Burnt Boat Drive, Suite 101
Bismarck, ND 58503
(701) 222-1315

Attorneys for Defendants-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph

Cases

Statutes

Other Authorities

Rules

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[1] Whether Plaintiffs-Appellants' expert affidavit complies with the requirements of N.D.C.C. § 28-01-46?

[2] Whether Plaintiffs-Appellants may assert Lyle Lima's assigned medical-malpractice claim?

[3] Whether Plaintiffs-Appellants may assert a third-party medical-malpractice claim against Defendants-Appellees?

STATEMENT OF THE CASE

[4] Defendants-Appellees Dakota Eye Institute, P.C., Dakota Eye Institute, LLP, and Briana Bohn, O.D., do not disagree with Plaintiffs-Appellants Statement of the Case.

STATEMENT OF THE FACTS

[5] On May 28, 2016, Plaintiff-Appellant Lyle Lima (Lima) was driving his truck on the highway near Wolford, North Dakota, and rear-ended a hay wagon in which members of the Cichos and Halvorson families were riding. Margaret Cichos, Lyman Halvorson, Kenzie Halvorson, and A.H. were injured, and Bradley Cichos died at the accident scene. According to the Cichos and Halvorson Plaintiffs, Plaintiff Lima, due to poor vision, did not see the trailer, causing the collision on the highway. (Appellant's Appendix 007 ¶ 11; Appellant's Appendix 008 ¶¶ 17-18). This was the basis for their complaint against the Dakota Eye Institute defendants and Dr. Bohn. The Dakota Eye Institute defendants were named defendants based on vicarious liability for their employee provider, Dr. Bohn. No independent claim was made against them.

[6] Their complaint further alleged, on April 27, 2015, an ophthalmologist at Dakota Eye Institute determined Lima was legally blind, prepared a certificate of blindness, and explained to his spouse that he was not legally permitted to drive. (*Id.* ¶¶ 17-18). The

complaint additionally alleged that, about one year later, when Lima returned for a routine eye exam on April 12, 2016, Dr. Bohn, an optometrist, conducted an eye examination of Lima and determined his vision had improved to a level that would allow him to drive "with some restrictions"—Lima should not drive at night or on the highway. (Tr. 17:10-11). Allegedly, after Dr. Bohn's examination, Lima's vision remained below the state's minimum vision standards for operating a vehicle. (Appellant's Appendix 008 ¶ 21).

[7] After the accident, Margaret Cichos initiated a claim, and subsequently a lawsuit, against Lima and Lyman Halvorson. (Appellant's Appendix 007 ¶ 14; Appellees' Appendix 14-20). In a settlement agreement between Lima and Cichos and the other named plaintiffs, Lima assigned his medical malpractice claim to them. (*Id.*; Appellees' Appendix 1-3 ¶¶ D, 2) Cichos and the other Assignee-Plaintiffs then agreed to "only pursu[e] the limits of Lyle Lima's insurance policy, and agree[d] not to pursue Lyle Lima's personal assets," and released Lima from any further liability for their claims. (Appellees' Appendix 2 ¶ 1).

[8] Cichos, Halvorsons, and Lima (Cichos) then sued Dr. Bohn and the Dakota Eye Institute defendants, serving a summons and complaint on April 10, 2018. Defendants responded by filing a motion to dismiss under Rule 12(b)(6) of the North Dakota Rules of Civil Procedure because Lima lacked standing to pursue a personal injury claim against Defendants after assigning away his medical negligence claim and Assignee-Plaintiffs failed to state a claim since personal injury torts are not assignable. (Doc. # 6 ¶¶ 7, 11).

[9] The Court held a hearing on June 21, 2018. Lima did not appear personally nor was represented by counsel at the hearing. After the hearing, the Court took Defendants' motion under advisement.

[10] In Margaret Cichos' separate lawsuit against Lima and Lyman Halvorson, filed June 18, 2018, she alleged a negligence claim against each. (*See* Appellees' Appendix 14-20 (Cichos Complaint, Case No. 35-2018-CV-00049)). According to Cichos's separate action and contrary to what she and the other Assignee-Plaintiffs alleged in this action, Cichos alleged Lima was negligent because he failed to keep a proper lookout: "[A]s Lima came over a hill, he was distracted and did not see the Halv[o]rson trailer on the side of the road. As a result, the front end of the Lima pickup struck the rear end of the Halv[o]rson trailer." (Appellees' Appendix 15-16 ¶¶ 10, 14). Cichos also alleged Halvorson, the driver of the horse-drawn trailer, was negligent because he failed to keep a proper lookout, causing the accident. (Appellees' Appendix 17 ¶¶ 22-23).

LAW AND ARGUMENT

I. Standard of review

A. Motion to dismiss for failure to comply with N.D.C.C. § 28-01-46

[11] This court has not articulated a standard of review when a plaintiff in a medical malpractice action fails to provide an expert opinion as required by N.D.C.C. § 28-01-46. *Pierce v. Anderson*, 2018 ND 131, ¶ 10, 912 N.W.2d 291. This court has said, however, that where "the requirements of the statute were not met, it is not necessary to decide the appropriate standard of review under N.D.C.C. § 28-01-46." *Cartwright v. Tong*, 2017 ND 146, ¶ 8, 896 N.W.2d 638. Questions of law and statutory interpretation are fully reviewable on appeal. *Scheer v. Altru Health Sys.*, 2007 ND 104, ¶ 16, 734 N.W.2d 778.

B. Motion to dismiss for failure to state a claim on which relief may be granted under Rule 12(b)(6)

[12] When reviewing a Rule 12(b)(6) dismissal, this court construes the complaint in the light most favorable to the plaintiffs, taking as true the well-pleaded allegations in the

complaint. *Ziegelmann v. DaimlerChrysler Corp.*, 2002 ND 134, ¶ 4, 649 N.W.2d 556, 559. This court affirms judgment dismissing a complaint under this rule if it cannot "discern a potential for proof to support it." *Towne v. Dinius*, 1997 ND 125, ¶ 7, 565 N.W.2d 762.

II. Cichos failed to comply with the requirements of N.D.C.C. § 28-01-46 and, therefore, the district court properly dismissed their medical malpractice claim.

A. Cichos' expert affidavit failed to comply with N.D.C.C. § 28-01-46.

[13] Cichos first argues "the trial court erroneously applied the standard under N.D.C.C. § 28-01-46 by 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." This argument is based on Cichos' assertion that the statute requires only that the affidavit "support" a prima facie case for medical negligence, not that it "establish" one; and it misstates the district court's reasoning for dismissing Cichos' complaint. An examination of the court's order belies that it "appl[ied] additional requirements beyond the text of the statute for an admissible expert affidavit."

1. Cichos' argument that the trial court held them to a heightened standard to support a prima facie case for medical malpractice is not supported.

[14] Cichos' argument revolves around the statute's use of the word "support" and the trial court's use of the word "establish." N.D.C.C. § 28-01-46 provides:

> Any action for injury or death alleging professional negligence by a physician . . . or by any other health care organization, including . . . [a] group of physicians operating a clinic or outpatient care facility, 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*.

(Emphasis added). But examination of this argument reveals that it is a distinction without a difference, and amounts to an assertion that, by requiring Cichos to comply with the statute, the district court held them to a heightened standard.

[15] To support their assertion that the statute's use of the word "support" somehow requires less of a showing than "establish" a prima facie case for medical negligence, Cichos cites *Van Klootwyk v. Baptist Home*, a North Dakota Supreme Court case decided under the 1997 version of the statute. 2003 ND 112, 665 N.W.2d 679. In *Van Klootwyk*, the issue before the court was not the sufficiency of the plaintiff's affidavit, but whether an affidavit was required at all, based on the list of medical professionals listed in that version of the statute. As part of the court's discussion about the purpose of the expert affidavit statute, the court noted as dicta that the statute in effect at that time did "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." *Id.* at ¶ 10. And this is true: the 1997 version of the statute merely required that a plaintiff "obtain[] an admissible expert opinion to support the allegation of professional negligence within three months of the commencement of the action or at such later date as set by the court for good cause shown by the plaintiff." (Appellees' Appendix 21 (Senate Bill No. 2217, 1997 Amendment to N.D.C.C. § 28-01-46).

[16] But in 2005, the legislature revised the statute to specifically require that a plaintiff must present "an admissible expert opinion to support *a prima facie case of professional negligence* within three months of the commencement of the action." (Appellees' Appendix 22 (Senate Bill No. 2199, 2005 Amendment to N.D.C.C. § 28-01-46) (emphasis

added). This language requiring the affidavit to support a prima facie case of professional negligence has been part of the statute since then. *See* (Appellees' Appendix 23 (Senate Bill No. 1302, 2009 Amendment to N.D.C.C. § 28-01-46 (amending other language of the statute but leaving in place the requirement that the affidavit support a prima facie case of medical negligence)). Thus, any reference to *Van Klootwyk*'s dicta regarding the timing to establish a prima facie case of professional negligence is not relevant when discussing any version of the statute after 2005.

[17] This court has made clear that "[a] prima facie case of medical malpractice consists of expert evidence establishing the applicable standard of care, violation of that standard, and a causal relationship between the violation and the harm complained of." *Larsen v. Zarrett*, 498 N.W.2d 191, 192 (N.D. 1993); *Winkjer v. Herr*, 277 N.W.2d 579, 583 (N.D. 1979); *see Pierce*, 2018 ND 131, ¶ 12 ("To 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.") (quotation omitted); *Cartwright*, 2017 ND 146, ¶ 12 (same); *Johnson v. Mid Dakota Clinic, P.C.*, 2015 ND 135, ¶ 11, 864 N.W.2d 269 (same); *Johnson v. Bronson*, 2013 ND 78, ¶ 12, 830 N.W.2d 595 (same); *Scheer*, 2007 ND 104, ¶ 18 (same); *Haugenoe v. Bambrick*, 2003 ND 92, ¶ 11, 663 N.W.2d 175 (same); *Van Klootwyk*, 2003 ND 112, ¶ 20 (same). The statute may not use the word "establish," but it does require an expert affidavit setting forth "a prima facie case of professional negligence," the elements of which are "establishing the applicable standard of care, violation of that standard, and a causal relationship between the violation and the harm complained of." N.D.C.C. § 28-01-46, *e.g.*, *Pierce*, 2018 ND 131, ¶ 12.

[18] Therefore, the court did not apply a heightened standard for the expert affidavit in this case. Instead, the court examined the expert affidavit Cichos served and correctly concluded that

> [t]he expert affidavit fails to establish the applicable standard of care for any of the named Defendants. It does not indicate a deviation by two of the three Defendants and does not give a minimal assertion of causation between deviation and the harm complained of. All are required for a prima facie case of medical negligence. The affidavit clearly does not "support a prima facie case of medical negligence" as required by N.D.C.C. § 28-01-46.

(Appellant's Appendix 024 ¶ 12). This is not a heightened standard, it is the standard imposed by the statute.

[19] Cichos also asserts that the district court's application of this court's opinion in *Pierce v. Anderson* "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." But Cichos makes no effort to discuss *Pierce* or explain why its application here is "erroneous." And, in fact, the district court's reference to *Pierce* came in the context of explaining how this court defines "a prima facie case for professional negligence," a definition that includes a requirement that the affidavit *establish* the applicable standard of care. The court did not misapply *Pierce* or hold Cichos to a heightened standard for their expert disclosure when it determined that their expert affidavit did not sufficiently support a prima facie case for professional negligence.

2. Cichos' expert affidavit is insufficient because it does not meet the requirements under the statute.

[20] Cichos' expert affidavit states, in its entirety:

> [¶1] I, Alan S. Weingarden, M.D., after being duly sworn hereby state as follows:

> [¶2] I am a licensed medical provider and Board Certified in Opthalmology [sic]. I specialize in Neuro-ophthalmology, Oculoplasic [sic] Surgery and Orbital Diseases. I currently practice at the St. Paul Eye Clinic, P.A., in Woodbury, Minnesota.
>
> [¶3] I was contacted by the Traynor Law Firm to review the eye records of Lyle Lima that they had obtained with releases that were signed by Mr. Lima.
>
> [¶4] I conducted a review of Mr. Lima's records and found that Mr. Lima did not meet the driving vision requirements under North Dakota Law. I also found that Dr. Briana Bohn, O.D., deviated from the standard of care required of Optometrists in the State of North Dakota by allowing Lyle Lima to drive, despite the fact that he did not meet the driving vision requirement.

(Appellees' Appendix 12-13). The affidavit does not elucidate the standard of care as to any defendant. It does not address any deviation from the unspecified deviation of care by two of the three defendants. It makes no reference to any causation of Cichos' injury and damages. At base, the affidavit does not support a prima facie case for medical malpractice. *Pierce*, 2018 ND 131, ¶ 12 ("To 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.").

[21] Cichos makes no effort to demonstrate how the affidavit meets the requirement that it "support a prima facie case for professional negligence." They do not address the content of the affidavit, nor do they make any argument that it contains the required opinions regarding the standard of care, the deviation from the standard of care, and the causal connection between any alleged deviation of the unidentified standard of care and Cichos' injury and damages. Instead, they merely assert that the district court held them to a standard higher than that required by the statute.

B. The district court properly denied Cichos' request for an extension of time to "rehabilitate" their expert affidavit.

[22] Cichos presents a conclusory circular argument that, because the law requires them to disclose an affidavit supporting a prima facie case for medical negligence, they "showed good cause" for an extension of time to serve the expert affidavit. In other words, when their expert affidavit failed to meet the statutory requirement for such affidavits, there is "good cause" to give them an extension of time to disclose a compliant affidavit. This is not supported by the plain language of the statute and further ignores that Cichos' request was untimely.

1. Cichos' request for an extension of time to rehabilitate the expert affidavit was beyond the three-month period for service, which, under the plain language of the statute, made it untimely.

[23] Cichos asserts that their request "was timely[,] because it was made in response to [Defendants'] Motion to Dismiss [u]nder N.D.C.C. § 28-01-46." In making this argument, however, Cichos ignores the clear, unambiguous language of the statute. Moreover, they rely on language from case law decided before the most recent amendment to the statute, which added the clear, unambiguous language Cichos now ignores.

[24] N.D.C.C. § 28-01-46 permits an extension of time to serve an expert affidavit in a limited circumstance:

> . . . . 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. . . .

(Emphasis added). The statute unambiguously requires that any request for extension of time to serve the affidavit must be "made *before* the expiration of the three-month period following commencement of the action." *Id.* (emphasis added). Cichos commenced this

action on April 10, 2018, which set the date for service of the affidavit as July 10, 2018. Cichos did not request an extension of time to serve the affidavit until July 24, 2018, two weeks after the three-month deadline expired. Cichos did not comply with the requirement that they request an extension before the expiration of the three-month period. Therefore, the court correctly denied their request and dismissed their complaint.

[25] To support that the district court erroneously denied their untimely request, Cichos relies on language from *Scheer v. Altru Health System*, in which this court stated that "the statute's dismissing effect is triggered by the defendant's motion to dismiss. . . . If the plaintiff shows good cause for an extension prior to the court's ruling on the defendant's motion . . . . [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." 2007 ND 104, ¶¶ 22, 24. Cichos ignores, however, that the *Scheer* court was discussing a *prior version* of the statute, a version that the court acknowledged was silent on when the plaintiff had to show good cause for an extension of time: "The plain language of the statute does not, however, provide when or how a plaintiff can show good cause for additional time to serve the expert affidavit and thus avoid dismissal." *Id.* at ¶ 23.

[26] The language of the statute enacted in 2005—the version in effect at the time the court decided *Scheer*—did not address when a plaintiff had to seek the extension. At the time *Scheer* was decided, the statute provided :

> Any action for injury or death alleging professional negligence by a physician . . . 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.

(Appellees' Appendix 22 (N.D.C.C. § 28-01-46 (2005)). Thus, when *Scheer* was decided, the language of the statute did not prohibit granting an extension of time outside the three-month period for service of the affidavit.

[27] In 2009, however, two years after *Scheer*, and almost a decade before Cichos filed this action, the legislature amended the statute to clarify when a plaintiff must request the extension of time to serve an expert affidavit under the statute. The statute was amended to add the following language:

> . . . The court may set a later date for serving the affidavit for good cause shown by the plaintiff <u>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</u>. . . .

(Appellees' Appendix 23 (N.D.C.C. § 28-01-46 (2009)) (underlining added). And this court has recently acknowledged the effect of the plain language of the current version of the statue:

> [T]he plain reading of this statute [N.D.C.C. § 28-01-46] clearly and unambiguously requires a plaintiff to serve an affidavit from an expert witness containing an admissible expert opinion to support a prima facie case of professional negligence within three months of commencing this action unless good cause for an extension is granted *within that time period*.

Greene v. Matthys, 2017 ND 107, ¶ 11, 893 N.W.2d 179 (emphasis added). *Scheer*'s discussion of the time for a plaintiff to request an extension of time to serve the expert affidavit, therefore, no longer controls whether requests made under the *current* statute are timely. There simply can be no argument that, under the current version of the statute, Cichos made a timely request for extension of time to serve their expert affidavit. The trial court was correct to deny their untimely request for an extension of time.

2. Cichos' argument that they showed good cause to extend the time to serve the expert affidavit is not supported.

[28] Cichos' argument regarding a showing of good cause is as follows: Because the district court held Cichos to the standard articulated by N.D.C.C. § 28-01-46, and because their expert affidavit did not comply with the statutory requirements within the prescribed timeframe, "[g]ood cause existed" to extend the time to serve a compliant affidavit.

[29] First, the statute requires Cichos to have *shown* good cause for an extension of time. Cichos made no such showing, they simply assert that the district court should have given them more time after they failed to comply with the statute. Second, there is no good cause to show for an extension here. Cichos simply failed to serve an affidavit supporting a prima facie case of professional negligence within three months of commencement of this action, as required by the statute. N.D.C.C. § 28-01-46. This is not "good cause shown" for an extension of time to serve the expert affidavit. The district court correctly denied Cichos' request.

C. Cichos' claim is not based on an "obvious occurrence" that exempts them from compliance with the expert affidavit requirement.

[30] Cichos argues the district court erred by not addressing their argument that the obvious occurrence exception applies. This, too, is not supported.

[31] The obvious occurrence exception in the statute reads as follows:

> . . . This 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.

N.D.C.C. § 28-01-46. Cichos' claim against the Dakota Eye defendants and Dr. Bohn does not fall into any of the specific enumerated categories (failure to remove foreign substance

or performance of procedure on wrong patient, limb, or other part of the body). Therefore, if the exception is to apply, Cichos' claim must be some "other obvious occurrence."

[32] This court very recently addressed the "obvious occurrence" exception in *Pierce v. Anderson*. *Pierce* addresses the concept of *ejusdem generis* to determine how to identify "other obvious occurrence[s]" not enumerated in the statute:

> 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*. The word "obvious" means "easily understood; requiring no thought or consideration to understand or analyze; so simple and clear as to be unmistakable."

2018 ND 131, ¶ 12 (quoting *Larsen*, 498 N.W.2d at 194) (italics added). Thus, for the "other obvious occurrence" exception to apply, Cichos' claim must be based on alleged negligence so "easily understood, requiring no thought or consideration understand or analyze; so simple and clear as to be unmistakable." *Id.* Moreover, to be an "other obvious occurrence," "the occurrence that led to the result, *not the result itself*, must be obvious." *Greene*, 2017 ND 107, ¶ 14 (emphasis added).

[33] Cichos' claim against the Dakota Eye defendants and Dr. Bohn is based on the exercise of the professional judgment in treating and examining Lima, and informing him of the ways in which his activities had to be limited as a result of his eye condition. (*See generally* Appellants' Appendix 005-011). The occurrence that allegedly led to the result (Cichos' injuries) was the examination of Lima in the weeks before the accident, and Dr. Bohn's statements to Lima regarding his ability to drive a vehicle. Stated more specifically, Cichos alleges that Dr. Bohn was negligent in allegedly telling Lima that he could drive but not at night or on the highway after he had been certified as legally blind a year earlier. The occurrence *itself* must be "obvious," and the occurrence here—the analysis and

decisions that go in to determining a patient's visual impairments no longer preclude them from operating a vehicle—is not akin to operating on the wrong patient or the wrong part of a patient's body. Lima's medical treatment by Dr. Bohn is not something so "easily understood, requiring no thought or consideration understand or analyze; so simple and clear as to be unmistakable." *Pierce*, 2018 ND 131, ¶ 12 (quoting *Larsen*, 498 N.W.2d at 194). Accordingly, Cichos' claim does not fall into the "other obvious occurrence" exception.

III. Cichos may not assert Lima's assigned medical malpractice claim because personal injury claims, including medical malpractice claims, are not assignable.

[34] Cichos' argument that "the assigned claim is purely for recovery of monetary damages" as support for the assignability of Lima's medical malpractice claim is not supported. *All* tort actions, and the vast majority of other causes of action, seek "monetary damages." Whether Lima suffered physical—versus economic—injury is irrelevant to whether his medical malpractice claim is assignable.

A. A plaintiff's cause of action is determined by the facts establishing the right to make a claim, not the type of damages allegedly suffered.

[35] Cichos' assertion that Lima's assigned claim is for "money damages" obfuscates the basis for his claim. A cause of action "arises from the existence of a primary right in the plaintiff and an invasion of that right by some act or omission on the part of the defendant." *Farmers Ins. Exch. v. Arlt*, 61 N.W.2d 429, 434 (N.D. 1953). The facts that establish that right are what define a cause of action. *Id.*; *see Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002) ("A cause of action, often referred to as a claim, is '[a] group of operative facts giving rise to one or more bases for suing' or '[the] legal theory of a lawsuit.'") (quoting Black's Law Dictionary 214 (7th ed. 1999)); Black's Law

Dictionary (10th ed. 2014) (defining "cause of action" as "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person."). The facts that establish the basis for Lima's claim against the Dakota Eye defendants and Dr. Bohn demonstrate that the *only* basis for such a claim is a physician-patient relationship, therefore the *only* claim he could have is one for medical malpractice, a tort claim. Cichos does not dispute this. (*See, e.g.*, P. Br. ¶ 13). This is what defines Lima's claim—the form of his personal injury does not dictate his claim.

[36] A medical malpractice claim is based on the existence of a duty arising out of a physician-patient relationship, and a breach of that duty that causes harm to the patient. *Larsen*, 498 N.W.2d at 192. Without the physician-patient relationship, there is no duty giving rise to a claim. These are intensely personal claims, not unlike personal injury claims, which are not assignable. *See Regie de L'Assurance Auto. du Quebec v. Jensen*, 399 N.W.2d 85, 89 (Minn. 1987) (stating that a right to recover damages for a personal tort is a personal right that is not assignable). The common law is well-settled on this, and, in fact, "the exception[] to the general rule favoring assignability of causes of action include *tort causes of action for wrongs done to the person*," i.e. personal injury claims. *AMCO Ins. Co. v. All Sols. Ins. Agency, LLC*, 244 Cal. App. 4th 883, 892, 198 Cal. Rptr. 3d 687, 694 (2016) (emphasis added), *review denied* (Apr. 20, 2016). As a result, because the facts establishing Lima's right to sue only give rise to a medical malpractice tort claim for wrongs done to the person, it makes no difference if Lima's injuries are "only" economic or if he would only seek "monetary damages," because such claims are not assignable.

B. Malpractice claims arise out of intensely personal relationships that give rise to a duty; such claims are not assignable.

[37] The reasons such claims are not assignable are logical: courts recognize that the nature of "[a] cause of action for a personal tort is strictly personal." *E.g.*, *Boogren*, 97 Minn. at 54, 106 N.W. at 106. "The prohibition against the assignment of personal injury claims is based on public policy, such as avoiding the dangers of maintenance and champerty." *Lingel v. Olbin*, 198 Ariz. 249, 253, 8 P.3d 1163, 1167 (Ct. App. 2000) (quoting *Karp v. Speizer*, 132 Ariz. 599, 601, 647 P.2d 1197, 1199 (App. 1982)). "'Maintenance' is defined as assisting another in litigation without a personal interest in its outcome[,] . . . . [and] '[c]hamperty' exists if there is an agreement that the person providing litigation assistance will share in the proceeds of the litigation." *Id.* at n. 8 (citations omitted). Which is to say the prohibition on assignment of personal tort claims exists to prevent situations like the one here, where Cichos "provide[s] litigation assistance" to Lima for the purpose of "shar[ing] in the proceeds of the litigation," and Lima's presence in this litigation is exclusively to "assist[] another in litigation without a personal interest in its outcome," because he assigned away his claims and Cichos agreed not to pursue any of his assets. *Id.*; *see also* Appellants' Appendix 007 ¶ 13 ("Lima and Plaintiffs further recognize that the accident would have been avoided but for the malpractice of Defendants.")).

[38] Cichos' argument that the assignment of Lima's medical malpractice claim is "similar to the assignment of an insurance claim" disregards the fundamental differences between a contract-based claim and a claim arising out of personal services rendered. Cichos point to *Groce v. Fidelity General Insurance Company* as "comparable with the assignment by Lima," a wholly misplaced assertion. (*See* P. Br. ¶ 17 (citing 252 Or. 296, 448 P.2d 554 (1968)). That case dealt with whether an insured could assign his bad-faith-

failure-to-settle claims against his insurer to parties who obtained a judgment against him after being injured by him in a car accident. The fundamental difference there is that the assignees of the insured's claims sued based on an assignment of a claim arising out of the insured's contract with his insurer. The basis for the insurer's duty to its insured was defined by the insurance contract, and it was that contract that obligated the insurer to settle claims against its insured in good faith.

[39] In this case, Lima's claim against the Dakota Eye defendants and Dr. Bohn arises out of the doctor-patient relationship. Lima had no contract with Dakota Eye or Dr. Bohn or their malpractice insurer. The nature of their duty to Lima is defined by the standard of care, and any alleged breach thereof occurred during the rendering of personal services. Cichos glosses over this important distinction, and instead simply assert that "Lima's assigned claim is similar to the assignment of an insurance claim" without any analysis supporting that assertion. But the facts that define the potential claim of the *Groce* assignor were nothing like those here, therefore the claim was completely different. And it is the *nature* of a medical malpractice cause of action that makes it unassignable, not simply the injury or claimed damages. *Groce* is wholly inapposite as respects Lima's attempt to assign a tort claim against Dakota Eye and Dr. Bohn.

[40] Cichos then asserts that the Dakota Eye defendants and Dr. Bohn "equate a medical malpractice claim with a personal injury claim," and "submit that this correlation of malpractice and personal injury is misleading and contrary to the accepted definition of 'malpractice.'" Consequently, the Dakota Eye defendants and Dr. Bohn point this court to legal malpractice cases—claims much more similarly aligned with medical malpractice

claims than insurance claims—to provide more instructive authority in understanding why medical malpractice claims are not assignable.

[41] The elements of a legal malpractice claim and a medical malpractice claim are the same, and it is only the nature of the relationship (attorney-client, physician-patient) that differs. *See Johnson v. Haugland*, 303 N.W.2d 533, 538 (N.D. 1981) ("'Malpractice,' as defined in Webster's Third New International Dictionary (Unabridged 1971), is 'the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result that injury, loss, or damage to the recipient of those services or to those entitled to rely upon them.'"). Legal malpractice claims are generally not assignable. 6 Am. Jur. 2d Assignments § 57. The often-articulated reason for the unassignability of legal malpractice claims is the "uniquely personal nature" of the services rendered, the personal nature of the attorney's duty to the client, and the confidentiality of the attorney-client relationship. *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 395, 133 Cal. Rptr. 83, 86 (Ct. App. 1976). These reasons are repeated throughout the case law across the country. *See Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves*, 709 F. Supp. 44, 50 n.7 (D. Conn. 1989); *VinStickers, LLC v. Stinson Morrison Hecker*, 369 S.W.3d 764, 767 (Mo. Ct. App. 2012); *Wagener v. McDonald*, 509 N.W.2d 188, 191 (Minn. App. 1993); *Bank IV Wichita, Nat. Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson*, 250 Kan. 490, 499, 827 P.2d 758, 764 (1992). And in retaining an attorney to represent him, a client creates a professional relationship with the attorney,

> which define[s] the scope of reciprocal rights and duties of the parties. The attorneys' duty to their client arising out of their professional employment [is] a personal one running solely to [the client] . . . . An attorney has but one intended

> beneficiary, his client . . . , and no one other than [the client] [is] intended to be benefitted by defendants' performance."

Goodley, 62 Cal. App. 3d at 396, 133 Cal. Rptr. at 86–87.

[42] The same is true in a physician-patient relationship, where the patient forms a professional relationship with a physician, and which comes with certain duties flowing from the physician to the patient. The same reasons underlying the unassignability of legal malpractice claims exist in medical malpractice actions. The relationship involves unique and definitively personal services rendered by a medical professional to a particular patient. The scope of the physician's duties to the patient arises out of that relationship, and that relationship only creates a duty to the patient being treated. The intended beneficiary of a physician-patient relationship is the patient. The relationship is based on an obligation of confidentiality to form the basis for trust and effective treatment of a patient. The result, then, is that medical malpractice actions—like legal malpractice actions—are not assignable. The district court correctly dismissed Cichos' claim asserting Lima's assigned medical malpractice claim.

IV. The district court did not err in dismissing Cichos' third-party medical malpractice claims.

[43] Cichos also asserts that the district court erred in dismissing their third-party medical malpractice claim. This argument should fail for three reasons.

[44] First, North Dakota has not recognized a claim for third-party medical malpractice. Accordingly, under North Dakota law, there is no cognizable claim for third-party medical malpractice.

[45] Second, such claims are infrequent in jurisdictions where they *are* permitted, and those courts have held that, where the allegation is that the physician had a duty to warn third parties, such a duty only arises "where the patient makes specific threats against

identifiable third parties," and, where the allegation is that the physician had a duty to control the patient to protect third parties, such a duty only arises when the physician actually has the ability to control the patient and the harm to a third party is foreseeable. *Molloy v. Meier*, 660 N.W.2d 444, 450 (Minn. App. 2003), *aff'd*, 679 N.W.2d 711 (Minn. 2004). And multiple courts considering third-party claims where the plaintiff was injured as a result of a patient's use of a motor vehicle and subsequent injury to the plaintiff have held that there is no special relationship between the physician and the injured third party giving rise to a malpractice claim. *See Coombes v. Florio*, 450 Mass. 182, 198–200, 877 N.E.2d 567, 578–79 (2007) (stating that a physician does not have a duty to control a patient's behavior once he leaves the office, but should advise patient of risks); *Schmidt v. Mahoney*, 659 N.W.2d 552 (Iowa 2003) (physician who allegedly advised his seizure patient that she could safely operate a motor vehicle owed no duty to third party who was allegedly seriously injured when patient suffered a seizure, lost control of the vehicle she was driving, and collided with vehicle occupied by third party, precluding third party from recovering against physician for malpractice, negligent misrepresentation, and negligent failure to control patient's conduct); *Kolbe v. State*, 661 N.W.2d 142, 146–47 (Iowa 2003) (stating that, while plaintiffs allege the doctors had a duty to protect plaintiffs and the public at large from any danger patient posed to other motorists and pedestrians, "there is no more of a special relationship between [patient's] physicians and [plaintiffs] than there is between the physicians and the entire driving public"); *Calwell v. Hassan*, 260 Kan. 769, 786–87, 925 P.2d 422, 433 (1996) (declining to impose on physicians a duty to warn a patient of something the patient is already aware of).

[46] Cichos relies on *Davis v. S. Nassau Communities Hospital* to support their contention that the court should have found a special relationship between themselves and Dr. Bohn giving rise to a duty that Dr. Bohn allegedly breached. (*See* P. Br. ¶¶ 26-29 (citing 26 N.Y.3d 563, 46 N.E.3d 614 (2015)). In *Davis*, the allegation was that the defendants did not warn the patient that the opioid-narcotic painkiller and benzodiazepine drug they administered to her could impair her ability to safely drive a vehicle. 26 N.Y.3d at 570, 46 N.E.2d at 616. The court concluded that the defendants should have warned the patient about the effects of the drugs, and that their failure to do so gave rise to the plaintiffs' third party claim. But the *Davis* court did not hold that the defendants had a duty to *stop* the patient from driving.

[47] Here, Dr. Bohn told Lima that he could drive, but "with some restrictions"—not at night or on the highway. (Appellant's Appendix 008 ¶ 22; Tr. 17:10-11). And Cichos does not allege that Dr. Bohn gave Lima carte blanche to drive his truck without warning—she told him he needed to follow certain restrictions. (*Id.*; Tr. 17:10-11). This accident occurred on the highway. (Appellees' Appendix 15 ¶ 9). Cichos also admitted that Lima previously disregarded the instructions of the doctor who initially issued his certificate of blindness; despite being told that he was legally blind and that he was not allowed to drive a vehicle, Lima continued to "drive . . . around his farm yard." (Tr. 16:14-25; *see* Appellant's Appendix 008 ¶¶ 17-18). Moreover, Cichos' theory of liability in her claim against Lima was that the collision was a result of his inattentive driving, and makes no reference to his eye condition. (*See* Appellees' Appendix 15-16 ¶¶ 10, 14). In other words, by Cichos' own allegations, Dr. Bohn *warned* Lima about restrictions on his driving and the accident occurred when Lima was *ignoring that warning* at the time of the collision.

CONCLUSION

[48] For the foregoing reasons, Dakota Eye Institute, P.C., Dakota Eye Institute, LLP, and Dr. Briana Bohn respectfully request this court affirm the district court's orders granting their motions to dismiss under N.D.C.C. § 28-01-46 and N.D. R. Civ. P. 12(b)(6).

[49] Dated: March 25, 2019.

By: 

Tracy Vigness Kolb, ND ID #05338
Meagher & Geer, P.L.L.P.
1900 Burnt Boat Drive, Suite 101
Bismarck, ND 58503
Telephone: (701) 222-1315

Attorneys for Defendants-Appellees

12600835.1

IN THE SUPREME COURT OF THE 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, v. 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

CERTIFICATE OF SERVICE

[1] I certify that on March 25, 2019, a true and correct copy of **Appendix of Defendants-Appellees** and **Brief of Defendants-Appellees** were served electronically, via email, upon the following:

Daniel M. Traynor	dantraynor@traynorlaw.com
Jonathon F. Yunker	jackyunker@traynorlaw.com
Timothy M. O'Keeffe	tim@okeeffeattorneys.com
Mark V. Larson	larslaw@srt.com
Jason R. Vendsel	jvendsel@mcgeelaw.com

Dated this 25th day of March, 2019.

/s/Tracy Vigness Kolb

Tracy Vigness Kolb, ND ID #05338
MEAGHER & GEER, P.L.L.P.
1900 Burnt Boat Drive, Suite 101
Bismarck, ND 58503
Ph: 701.222.1315; Direct Ph: 701.333.0638
tkolb@meagher.com
Attorneys for Defendants-Appellees