

**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

REPLY 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. 35-2015-CV-00022

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Table of Authorities	ii
	<u>Paragraph</u>
Argument	1
I. Dakota Eye Institute fails to refute Injured Parties’ assertion that third-party liability can attach to Dakota Eye Institute	2
II. Assignees’ collective claim is actionable because Lima’s medical malpractice claim can be assigned	7
III. Dakota Eye Institute misconstrues the requirements of an expert affidavit pursuant to N.D.C.C. § 28-01-46 by ignoring the plain language of this statute	9
Conclusion	14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph</u>
<u>Greene v. Matthys</u> , 2017 ND 107, 893 N.W.2d 179	12
<u>Larsen v. Zarrett</u> , 498 N.W.2d 191 (N.D. 1993).....	11, 13
<u>Statutes</u>	<u>Paragraph</u>
N.D.C.C. § 28-01-46.....	<i>passim</i>
N.D.A.C. ch. 37-08-01	2, 5, 13

ARGUMENT

[¶1] This is a case of first impression, as this State has yet to extend a physician’s duty of care to foreseeable third parties. Injured Parties ask this Court to join a plurality of jurisdictions in recognizing the existence of such a duty under limited circumstances. Injured Parties also ask this Court to recognize North Dakota law does not prohibit the assignment of malpractice claims involving a financial injury and apply the long-standing rule allowing assignment of a chose in action. Finally, Injured Parties ask this Court apply the plain language of N.D.C.C. § 28-01-46 as the standard for expert opinion in a medical negligence case. In so doing, Injured Parties ask this Court find the trial court erred in dismissing the Complaint by concluding: (1) third-party liability cannot attach to Dakota Eye Institute; (2) Lima’s medical malpractice claim cannot be assigned; 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. Dakota Eye Institute fails to refute Injured Parties’ assertion that third-party liability can attach to Dakota Eye Institute.

[¶2] Injured Parties¹ submit third-party liability can attach to Dakota Eye Institute. Injured Parties support their assertion by citing a growing number of jurisdictions which recognize a physician’s duty of care to foreseeable third parties. Injured Parties argue the objective minimum vision requirements contained in the North Dakota Administrative Code are sufficient to impose a duty to third parties. See N.D.A.C. ch. 37-08-01, see also Brief of Appellants, ¶ 28. Dakota Eye Institute fails to acknowledge the plurality of jurisdictions recognizing third-party liability and disregards Injured Parties’ argument of an objective standard to impose liability in this case.

¹ “Injured Parties” collectively refers to all Plaintiffs-Appellants.

Accordingly, Dakota Eye Institute fails to refute Injured Parties' assertion that third-party liability can attach to Dakota Eye Institute.

[¶3] Dakota Eye Institute argues third-party liability cannot attach because "North Dakota has not recognized a claim for third-party medical malpractice." Brief of Defendants-Appellees, ¶ 44. Injured Parties, as well as the trial court, recognize this is a case of first impression in North Dakota. However, presenting an issue which has never arisen in North Dakota is not sufficient reason to reject the issue presented.

[¶4] Dakota Eye Institute claims third-party liability is infrequently allowed in other jurisdictions. See id. ¶ 45. Dakota Eye Institute cites only three jurisdictions which decline to impose third-party liability on physicians. Id. Injured Parties cite eighteen jurisdictions - a plurality - recognizing a third-party claim of medical negligence in the limited context of a patient's operation of a vehicle. See Brief of Appellants, ¶¶ 24-37. If a jurisdictional review of third-party liability were broadened to include cases not involving motor vehicles, Injured Parties submit the number of jurisdictions recognizing third-party liability would be greater than those already identified and briefed. Accordingly, a growing plurality of jurisdictions recognize a physician's duty of care to foreseeable third parties under limited circumstances.

[¶5] In denying third-party liability, the trial court found "Lima was in the best position to know whether he had the ability to safely drive." Appellants' Appendix, at 026, ¶ 18. Injured Parties dispute the trial court's finding and argue Dr. Bohn was in the best position to know whether Lima had the ability to safely drive. Injured Parties compare this argument to North Dakota's dram shop laws. Under North Dakota law, a bartender is required to use his subjective judgment to determine when to stop serving alcohol to a patron. Yet under North Dakota law, an optometrist has the benefit of an objective standard to determine whether a patient has the ability to safely drive. See

N.D.A.C. ch. 37-08-01 (stating the minimum vision requirements to operate a motor vehicle in North Dakota). Dr. Bohn's examination of Lima revealed Lima's vision was below the minimum required to legally operate a vehicle under any conditions or restrictions. Yet Dr. Bohn told Lima he could drive with certain limitations. Injured Parties submit Dr. Bohn was in the best position to know whether Lima could safely drive and maintain the trial court erred in reaching a contrary conclusion. Dr. Bohn ignored the minimum vision requirements and told Lima he could drive with certain limitations. The law should not sanction a rule where a bartender has greater responsibility to the foreseeable public than a medical professional with defined standards in our administrative code.

[¶6] Injured Parties submit Dr. Bohn and Dakota Eye Institute breached a duty owed to foreseeable third parties by allowing Lima to drive even though Lima was below the minimum vision requirements to do so. Dakota Eye Institute failed to apply an objective standard to warn Lima he could not drive under any circumstances. If North Dakota declines to recognize third-party liability in this context, then North Dakota will continue to hold bartenders to a greater duty of care than physicians. Injured Parties submit the trial court erred in dismissing Injured Parties' individual claims.

II. Assignees' collective claim is actionable because Lima's medical malpractice claim can be assigned.

[¶7] Assignees² submit North Dakota law does not prohibit the assignment of personal injury claims. Assignees cite the long-standing rule allowing assignment of a chose in action. Dakota Eye Institute responds by arguing Lima's claim is for medical malpractice and such claims are not assignable due to the personal nature of the tort. Assignees submit Dakota Eye Institute

² "Assignees" collectively refers to all Plaintiffs-Appellants except for Lyle Lima.

mischaracterizes Lima's claim in an attempt to avoid liability and ignores the true nature of Lima's claim - namely, a purely financial loss resulting from the negligent acts of Dakota Eye Institute. Assignees maintain their collective claim is purely for the recovery of monetary damages and is, therefore, assignable. Assignees submit the trial court erred in dismissing their collective claim as an unassignable personal injury claim.

[¶8] Assignees argue Lima's claim is not one for personal injuries. Yet even if Lima's claim were, North Dakota does not prohibit the assignment of personal injury claims. Dakota Eye Institute fails to address this fact. Instead, Dakota Eye Institute responds by arguing Lima's claim is not assignable precisely because it is for personal injury without regard to the fact that Lima sustained no physical or mental injury. Lima's injury was financial only. Accordingly, Dakota Eye Institute's reasoning does not invalidate the assignment of Lima's claim or the actionable nature of Assignees' collective claim.

III. Dakota Eye Institute misconstrues the requirements of an expert affidavit pursuant to N.D.C.C. § 28-01-46 by ignoring the plain language of this statute.

[¶9] Dakota Eye Institute contends Injured Parties' expert affidavit does not comply with N.D.C.C. § 28-01-46. Dakota Eye Institute expends considerable effort briefing this issue, including citation to prior enactments of this statute, to argue the trial court properly dismissed the Complaint pursuant to N.D.C.C. § 28-01-46. See Brief of Defendants-Appellees, ¶¶ 13-33. Injured Parties submit Dakota Eye Institute's lengthy analysis of the expert affidavit ignores the plain language of N.D.C.C. § 28-01-46 which requires "an admissible expert opinion *to support* a prima facie case of professional negligence" N.D.C.C. § 28-01-46 (emphasis added). Injured Parties' expert affidavit satisfies the requirements of N.D.C.C. § 28-01-46. Accordingly, Injured Parties submit the trial court erred in dismissing the Complaint pursuant to N.D.C.C. § 28-01-46.

[¶10] Dakota Eye Institute dissects N.D.C.C. § 28-01-46 by discussing three enactments of this statute and citing a myriad of case law interpreting the same. See Brief of Defendants-Appellees, ¶¶ 13-33. Yet Dakota Eye Institute’s analysis of N.D.C.C. § 28-01-46 fails to address the plain language of this statute, which includes:

[a]ny 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.

N.D.C.C. § 28-01-46 (emphasis added). The plain language of N.D.C.C. § 28-01-46 does not require an affidavit to “establish,” “maintain,” or “set forth” a prima facie case of professional negligence. See N.D.C.C. § 28-01-46. Instead, an affidavit must only *support* a prima facie case. Id.

[¶11] Dakota Eye Institute admits N.D.C.C. § 28-01-46 does not contain language requiring an affidavit *establish* a prima facie case of professional negligence, yet Dakota Eye Institute stubbornly insists otherwise. See Brief of Defendants-Appellees, ¶ 17. Dakota Eye Institute continues to assert the affidavit must set forth a prima facie case. Id. Dakota Eye Institute’s argument does not coincide with the purpose of N.D.C.C. § 28-01-46. “Section 28-01-46 [N.D.C.C.] was designed to minimize frivolous claims against physicians . . .” Larsen v. Zarrett, 498 N.W.2d 191, 192 (N.D. 1993). Accordingly, the purpose of N.D.C.C. § 28-01-46 is not to require the plaintiff produce a prima facie case of professional negligence early in the litigation, nor does this statute require a medical expert recite the elements of negligence and draw legal conclusions he is not qualified to make.

[¶12] Section 28-01-46, N.D.C.C., requires an expert opinion to support a prima facie case, and nothing more. This conclusion is consistent with the plain language of N.D.C.C. § 28-01-46. This

court, in Greene v. Matthys, 2017 ND 107, 893 N.W.2d 179, analyzed N.D.C.C. § 28-01-46 and stated:

the 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. The court in Greene found N.D.C.C. § 28-01-46 is unambiguous. Injured Parties submit Dakota Eye Institute is trying to create an ambiguity where one does not exist by arguing N.D.C.C. § 28-01-46 requires more than what is stated in the plain language of the statute. Injured Parties contend the trial court erred in dismissing the Complaint by concluding the Injured Parties' expert affidavit required more than is set forth in the plain language of N.D.C.C. § 28-01-46.

[¶13] Dakota Eye Institute argues the obvious occurrence exception in N.D.C.C. § 28-01-46 does not apply in this case. See Brief of Defendants-Appellees, ¶¶ 30-33. "The 'obvious occurrence' exception applies only to cases that are plainly within the knowledge of a layperson. 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). To test the "obvious occurrence" exception, one could ask a layperson: "Should a blind man be allowed to drive a car?" Injured Parties have no doubt as to the layperson's response. Dakota Eye Institute and Dr. Bohn allowed Lima to drive despite the fact he did not meet the minimum statutory vision requirements to operate a vehicle under N.D.A.C. ch. 37-08-01. Injured Parties submit Dakota Eye Institute's alleged negligence clearly falls within the "obvious occurrence" exception to N.D.C.C. § 28-01-46. Accordingly, the trial court erred in failing to consider the "obvious occurrence" exception under N.D.C.C. § 28-01-46. The trial court

further erred in requiring Injured Parties' affidavit meet requirements beyond the plain language of N.D.C.C. § 28-01-46.

CONCLUSION

[¶14] In this appeal, Injured Parties respectfully request 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.

[¶15] DATED April 5, 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

AFFIDAVIT OF SERVICE VIA ELECTORNIC MEANS

STATE OF NORTH DAKOTA

ss

COUNTY OF RAMSEY

[¶1] Andrea Johnson, being first duly sworn on oath, does depose and say: She is a legal resident of the State of North Dakota, of legal age, and not a party to the above-entitled matter.

[¶2] That on April 5, 2019, affiant served via electronic means, a true and correct copy of the following document(s):

1. Reply Brief of Appellants

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

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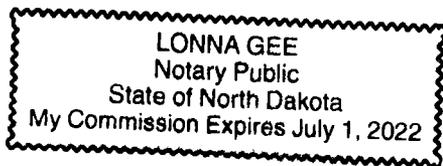
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[¶4] To the best of affiant’s knowledge, the address above given was the actual electronic mail address of the party intended to be served. The above documents were duly served in accordance with the provisions of the Rules of Civil Procedure.



Andrea Johnson

[¶5] Subscribed and sworn to before me on April 5, 2019.





Notary Public