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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The Bone & Joint Center, P.C., Petitioner, vs. The Honorable Thomas Schneider, Judge of the District Court, South Central Judicial District, Respondent.	**SUPREME COURT NO.** Civil No. 08-2019-CV-00640

PETITION FOR SUPERVISORY WRIT ORAL ARGUMENT REQUESTED

Brenda L. Blazer (#04155)
Briana L. Rummel (#08399)
VOGEL LAW FIRM
Attorneys for Petitioner
US Bank Building
200 North 3rd Street, Suite 201
PO Box 2097
Bismarck, ND 58502-2097
Telephone: 701.258.7899
Email: bblazer@vogellaw.com
brummel@vogellaw.com

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] Whether this Court should issue a supervisory writ to the District Court because the District Court erroneously concluded the Plaintiff's, Kevin McKibbage ("McKibbage"), purported expert affidavit satisfied the requirements of Section 28-01-46 of the North Dakota Century Code and failed to grant Petitioner's, The Bone & Joint Center, P.C. ("Bone & Joint"), Motion to Dismiss for McKibbage's failure to produce an admissible expert opinion as to his direct professional negligence claim as required by statute.

STATEMENT OF THE CASE

[¶2] Bone & Joint brings this Petition for a supervisory writ from this Court as to the District Court's November 16, 2020 Order denying its Motion to Dismiss. (*Order*, App. 78-88). Bone & Joint respectfully requests this Court exercise its jurisdiction to rectify the Order denying its Motion to Dismiss issued by the District Court in error. The District Court issued its Order in error as McKibbage failed to produce an admissible expert opinion in the form of an affidavit as to his direct professional negligence claim against Bone & Joint within three months of commencing suit as required by Section 28-01-46 of the North Dakota Century Code. The District Court's November 16, 2020 Order is unsupported by law and creates an injustice for which Bone & Joint has no adequate alternative remedy. Bone & Joint respectfully requests this Court take original jurisdiction of the above-referenced matter and reverse the District Court's denial of its Motion to Dismiss. Bone & Joint submits this Petition for Supervisory Writ with a request for oral argument before the North Dakota Supreme Court given the novel issues in this case.

STATEMENT OF THE FACTS

[¶3] This Petition for Supervisory Writ stems from an Order denying Bone & Joint's Motion to Dismiss issued in Burleigh County District Court, Case No. 08-2019-CV-00640, which McKibbage commenced relating to care he received from Dr. Daniel Dixon ("Dr. Dixon"). (*Order*, App. 78-88). Dr. Dixon performed a lumbar instrumented fusion on McKibbage on March 7, 2017. (*Complaint*, App. 11 at ¶ 8). Dr. Dixon performed a second surgery on McKibbage on March 29, 2017. *Id*. at App. 12, ¶ 9. McKibbage contends that following the March 7, 2017 surgery he developed a hematoma and signs and symptoms of cauda equina syndrome and that the second surgery Dr. Dixon performed on March 29,

2017, to evacuate the hematoma, was too late to reverse the sequelae of the cauda equina syndrome, allegedly causing McKibbage permanent injury. *Id*.

[¶4] For his causes of action, McKibbage asserts five separate counts. Count I is a negligence claim against Dr. Dixon alleging medical malpractice. *Id*. at App. 12-13, ¶¶ 11-14. Count II is a direct professional negligence claim against Bone & Joint in which McKibbage alleges Bone & Joint breached the duty it owed to McKibbage to provide medical care and treatment in a manner commensurate with the applicable and recognized standard of care for a similarly situated health care provider. *Id*. at App. 13, ¶16. McKibbage contends Bone & Joint was negligent in the following ways:

> a. Bone & Joint was negligent in the selection and appointments of its agents, servants, employees, physicians and nurses, including but not limited to Dixon so as to allow physicians and nurses to practice under its employ that were not qualified to render medical care in accordance with the prevailing professional medical standards.[1]
>
> b. Bone & Joint was negligent in not providing adequate rules and regulations governing the conduct of its agents, servants, employees, physicians and nurses, including but not limited to Dixon, or in the alternative, if such rules and regulations were promulgated, Bone & Joint was negligent in failing to adequately supervise their physicians and nurses to ensure that its rules and regulations were followed.

Id. at App. 13, ¶¶ 17(a)(b). McKibbage claims that as a result of Bone & Joint's alleged direct professional negligence he has sustained severe injury, pain, disability, disfigurement, mental anguish, loss of enjoyment of life, loss of earnings and earning capacity, medical expenses, and physical handicap. *Id*. at App. 13, ¶ 18. Count III is a vicarious liability claim against Bone & Joint, as Dr. Dixon's alleged employer. *Id*. at App.

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[1] McKibbage has since abandoned his negligent selection claim. (*Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss Or, in the Alternative, Partial Summary Judgment,* App. 72, at fn. 3).

15, ¶¶ 19-21. Count IV is a direct negligence claim against CHI, asserting much of the same allegations against CHI as in Count II against Bone & Joint. *Id*. at App. 15-16, ¶¶ 22-25. Count V is a vicarious liability claim against CHI. *Id*. at App. 17, ¶¶ 26-27.

[¶5] Bone & Joint timely answered the Complaint, denying that the care and treatment provided to McKibbage was negligent in any respect and that it breached any applicable standard of care. (*Answer of The Bone & Joint Center, P.C. and Demand for Jury*, App. 21, ¶ 5). Bone & Joint affirmatively asserted that the medical services it provided were performed with reasonable care and diligence and with the degree of skill and care ordinarily possessed and exercised by healthcare providers in good standing with similar communities. *Id*. at App. 20-21, ¶ 4. That Bone & Joint is a professional corporation providing medical and surgical orthopedic services and that Dr. Dixon was an employee or partner of Bone & Joint at times material to this lawsuit are not in dispute. *Id*. at App. 20, ¶¶ 2-3.

[¶6] This case has been pending since February of 2019, but McKibbage has not served an expert affidavit in support of his claim for negligent supervision. On March 13, 2019, McKibbage served the Defendants with the Affidavit of Scott Shapiro, M.D. (*Certificate of Service*, App. 29). Dr. Shapiro opined, based on a reasonable degree of medical probability, that Dr. Dixon, Bone & Joint, and CHI deviated from the standard of care in the following ways:

> a. failure to surgically intervene in a timely and emergent fashion;
> b. failure to fully evaluate and treat the patient post-operatively;
> c. failure to recognize the clinical signs of cauda equina syndrome post-operatively.
> d. failing to order an MRI from March 7, 2017 to March 29, 2017;
> e. allowing the hematoma to remain compressing the thecal sac from March 7, 2017 to March 29, 2017 without imaging and without surgical intervention.

(*Affidavit of Scott Shapiro, M.D.*, App. 27, ¶ 3). Dr. Shapiro further opined, based on a reasonable degree of medical probability, that Bone & Joint and CHI, by and through its agents, deviated from the standard of care in the following ways:

> a. failed to accurately chart Mr. McKibbage's postoperative March 7, 2017 complaints;
> b. failed to appreciate that Mr. McKibbage's signs and symptoms reflected acute neurological deficit;
> c. failed to communicate to the physicians, including but not limited to Dixon, Mr. McKibbage's postoperative neurologic deficits which reflected developing cauda equina syndrome;
> d. failed to follow hospital policies and procedures by notifying superiors in the chain of command who could act upon this information in a timely fashion, in light of the inadequate orders and/or intervention by the physicians, including but not limited to Dixon, to deal with this evolving emergency;
> e. failed to appreciate and understand the severity of the situation;
> f. permitted an unreasonable passage of time to occur such that Mr. McKibbage's neurological deficit became permanent and irreversible and;
> g. otherwise failed to appreciate Mr. McKibbage's postoperative complications and neurological deficits that required urgent intervention such that Mr. McKibbage is left with permanent and significant injury which could have been prevented had Defendants acted in a timely fashion.

Id. at App. 27-28, ¶ 4. Dr. Shapiro expressed no opinions about Bone & Joint's supervision of its agents and/or employees, including Dr. Dixon.

[¶7] Although McKibbage timely served Dr. Shapiro's Affidavit, Dr. Shapiro's Affidavit does not establish a prima facie case of professional negligence as to his claim for negligent supervision and the time for serving the requisite expert affidavit or requesting an extension of time to do so has expired. Due to McKibbage's failure to produce an admissible expert opinion in support of his direct professional negligence case as required under Section 28-01-46 of the North Dakota Century Code, Bone & Joint filed its Motion to Dismiss. (*The Bone & Joint Center P.C.'s Motion to Dismiss*, App. 30-31; *Brief in Support of The Bone & Joint Center, P.C.'s Motion to Dismiss,* App. 32-52).

[¶8] Around the same time, McKibbage moved to amend his Complaint to "add specificity to the negligent supervision claim." (*Plaintiff's Motion to Amend*, App. 53-54). Bone & Joint opposed McKibbage's Motion to Amend, arguing that it was both untimely and futile, for his failure to comply with the statutory requirements of Section 28-01-46. (*The Bone & Joint Center P.C.'s Brief in Opposition to Motion to Amend*, App. 55-66).

[¶9] After a September 18, 2020 hearing on the pending Motion to Dismiss and Motion to Amend, the District Court issued its Order dated November 16, 2020, denying Bone & Joint's Motion to Dismiss and affording McKibbage leave to his amend his Complaint to add specification to his direct professional negligence claim against Bone & Joint. (*Order*, App. 78-88). This Petition for Supervisory Writ followed.

LAW AND ARGUMENT

[¶10] This case undeniably involves complex and technical medical procedures not within the knowledge and comprehension of laypeople absent the assistance of expert testimony. It is manifest that if the jury requires expert testimony to understand the complex and technical medical procedures at issue in this case, the jury also requires expert testimony to understand the essential elements of McKibbage's direct professional negligence claim against Bone & Joint. Phrased another way, if the jury needs expert testimony to understand the underlying medical malpractice allegations against Dr. Dixon, the jury similarly requires expert testimony to appreciate McKibbage's argument that Bone & Joint was allegedly negligent in its supervision of Dr. Dixon, who was hired to perform the complex and technical medical procedures at issue in this case. North Dakota law thus requires McKibbage to produce an admissible expert opinion in support of his professional negligence claims, including his direct professional negligence claim against Bone & Joint, within three months of commencing suit. The District Court should have granted Bone &

Joint's Motion to Dismiss McKibbage's direct professional negligence claim against it for his failure to produce the required expert affidavit. The District Court's erroneous denial of Bone & Joint's Motion to Dismiss is contrary to law and presents an extraordinary case in which Bone & Joint has no alternative adequate remedy other than a supervisory writ.

I. McKibbage's expert affidavit does not address his direct professional negligence claim against Bone & Joint and, therefore, fails to satisfy the statutory requirements of Section 28-01-46, mandating dismissal.

[¶11] It is well established in North Dakota that expert testimony is required in professional negligence cases to establish the degree of care and skill required of the physician and whether specific acts fell below that standard of care. *Jaskoviak v. Gruver*, 2002 ND 1, ¶ 12, 638 N.W.2d 1. This law is essentially codified in Section 28-01-46 of the North Dakota Century Code, requiring service of an admissible expert opinion in the form of an affidavit to support a prima facie case of medical malpractice within three months of commencing suit. *Larsen v. Zarrett*, 498 N.W.2d 191, 192 (N.D. 1993).

[¶12] There are limited statutory exceptions to the expert affidavit requirement. The requirement does not apply in cases involving the "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. CENT. CODE § 28-01-46. The "obvious occurrence" exception is only applicable in cases where "a physician's activity constitutes a blunder so egregious that a layman is capable of comprehending its enormity." *Jaskoviak*, 2002 ND 1, ¶ 12, 638 N.W.2d 1 (quoting *Winkjer v. Herr*, 277 N.W.2d 579, 585 (N.D. 1979)). The Court may also permit service of the requisite affidavit beyond the three-month benchmark, where the Plaintiff submits a request for an extension of time prior to the expiration of the three-month period following commencement of the action and good cause for the extension is

established. *See* N.D. CENT. CODE § 28-01-46. In this case, no exception is applicable and there is no dispute that McKibbage did not timely submit a request for an extension of time to serve an admissible expert opinion.

[¶13] The legislature passed Section 28-01-46 of the North Dakota Century Code as a preliminary screening mechanism for "totally unsupported claims," and it "seeks to prevent protracted litigation when a medical malpractice plaintiff cannot substantiate a basis for the claim." *Greenwood v. Paracelsus Health Care Corp. of N.D., Inc.*, 2001 ND 28, ¶ 8, 622 N.W.2d 195 (emphasis added). The statute was further "specifically designed to dispose of frivolous or nuisance medical malpractice actions at an early stage of the proceedings" and "to prevent the necessity of an actual trial in such cases." *Id*. The statute is designed to prevent prolonged litigation in the absence of an admissible expert affidavit. *Larsen*, 498 N.W.2d at 192. If a party fails to serve an admissible expert affidavit within the three-month timeframe, the Court is required to dismiss without prejudice. N.D. CENT. CODE § 28-01-46.

[¶14] Today, the statute provides, in relevant part:

> Any action for injury…alleging professional negligence by a physician…hospital…or by any other health care organization, including an ambulatory surgery center or 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. 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. The expert's affidavit must identify the name and business address of the expert, indicate the expert's field of expertise, and contain a brief summary of the basis for the expert's opinion. 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. CENT. CODE § 28-01-46.

[¶15] McKibbage served Bone & Joint with a Summons and Complaint on February 6, 2019, commencing the present action. (*Affidavit of Service*, App. 19); *see also* N.D. R. CIV. P. 3 ("A civil action is commenced by the service of a summons."). The deadline for McKibbage to serve the Defendants with the requisite expert affidavit was May 6, 2019. Although McKibbage served the Defendants with Dr. Shapiro's Affidavit on March 13, 2019, Dr. Shapiro's Affidavit does not meet the standard required by Section 28-01-46 as it relates to McKibbage's claim for negligent supervision against Bone & Joint.

[¶16] In this case, no exception is applicable and there is no dispute that McKibbage did not serve the Defendants with the requisite expert affidavit and did not request an extension of time to serve the requisite expert affidavit within the three-month period.[2] The plain language of Section 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. This Court has consistently strictly construed the expert affidavit requirement as set forth in Section 28-01-46.

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[2] The fact that McKibbage moved to amend his Complaint to "further clarify" his direct professional negligence claim against Bone & Joint is a non-issue. As Bone & Joint explained in opposition to McKibbage's Motion to Amend, McKibbage did not seek to add an entirely new claim. (*Bone & Joint's Brief in Opposition to Motion to Amend,* App. 55-66). Instead, he sought to assert additional factual allegations in support of his direct professional negligence claim against Bone & Joint. McKibbage should not have been permitted leave to amend his Complaint as his claim for negligent supervision should have been dismissed for his failure to timely serve an expert affidavit.

[¶17] For example, in *Greene v. Matthys*, the Plaintiff, rather than serving the Defendant with an expert affidavit within the three-month time period, notified the Defendant "by letter of the name of her expert and the substance of his proposed testimony within the three month period." *Id*. at ¶ 12. The Plaintiff argued that her letter satisfied the essence of Section 28-01-46. This Court, however, disagreed and held that the letter did not meet the requirements of Section 28-01-46 because the letter did not qualify as an expert affidavit. *Id*.

[¶18] The result is no different in this case. Dr. Shapiro's Affidavit fails to address the elements necessary to establish a prima facie case of professional negligent supervision. Dr. Shapiro has not stated the applicable standard of care for a health care organization to supervise its health care providers, how Bone & Joint violated the applicable standard in its supervision of health care providers, if at all, or how Bone & Joint's alleged violation of the standard of care is causally related to McKibbage's alleged damages. It is well-established that in order to make a prima facie showing of professional negligence, the plaintiff must produce expert evidence establishing the applicable standard of care, a violation of that standard, and a causal relationship between the violation and the harm complained of. *Haugenoe v. Bambrick*, 2003 ND 92, ¶ 11, 663 N.W.2d 175, 180. If any element is not attested to by an expert to a reasonable degree of medical certainty, a prima facie case has not been made. *Larsen*, 498 N.W.2d 191 (N.D. 1993) (dismissal was proper where affidavits of two experts, even together, did not support all elements of prima facie case of professional negligence). This analysis requires dismissal of Count II of McKibbage's Complaint.

[¶19] Instead, however, the District Court denied Bone & Joint's Motion to Dismiss, holding that "[t]he statute does not require the expert affidavit to specifically allege each and every cause of action that could arise from an occurrence of medical negligence." (*Order*, at App. 86, ¶ 27). Based on this erroneous interpretation of Section 28-01-46, the District Court held that Dr. Shapiro's Affidavit satisfies all that is required by statute. *Id*. at App. 86, ¶ 28. Respectfully, the District Court's interpretation and resulting conclusion is wrong.

[¶20] Section 28-01-46 serves a gate-keeping function in that it was designed to prevent protracted litigation of unsubstantiated claims. *See Van Klootwyk v. Baptist Home, Inc.*, 2003 ND 112, ¶ 10, 665 N.W.2d 679. The gatekeeping function of Section 28-01-46 is all but eliminated if plaintiffs are permitted to satisfy this statutory requirement as the District Court suggests. The expert affidavit required of Section 28-01-46 must have a relationship to the Complaint or the requirement is without meaning. In *Cichos v. Dakota Eye Institute, P.C.*, this Court held a district court's dismissal pursuant to Section 28-01-46 will be affirmed if "when looking at the affidavit in the light most favorable to the non-moving party, and assuming the facts alleged in the Complaint are true, the affidavit does not support a prima facie case of professional negligence as asserted in the Complaint." 2019 ND 234, ¶ 23, 933 N.W.2d 452 (emphasis added).

[¶21] Here, Dr. Shapiro's Affidavit fails to address the elements necessary to establish a prima facie case of professional negligent supervision as asserted in McKibbage's Complaint. In fact, Dr. Shapiro's Affidavit does not address McKibbage's claim for negligent supervision at all. *See Haugenoe*, 2003 ND 92, ¶ 11, 663 N.W.2d 175, 180; *Larsen*, 498 N.W.2d 191 (N.D. 1993).

[¶22] As Section "28-01-46 refers to an "admissible" expert opinion to support a medical malpractice claim, a trial court's role in reviewing an expert opinion under the statute may also be viewed as an evidentiary one." *Larsen*, 498 N.W.2d 191, fn 2. Rule 702 of the North Dakota Rules of Evidence governs the admission of expert testimony. *Id*. "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." N.D. R. EVID. 702. Dr. Shapiro's Affidavit offers no opinions as to Count II of McKibbage's Complaint let alone an "admissible" opinion. There is nothing about Dr. Shapiro's Affidavit that will assist the trier of fact in understanding McKibbage's negligent supervision claim.

[¶23] "The importance of the expert's affidavit in medical malpractice claims has been consistently recognized by this Court." *Cichos*, 2019 ND 234, ¶ 24 (citing *Pierce v. Anderson*, 2018 ND 131, ¶ 7, 912 N.W.2d 291); *see also Fortier v. Traynor*, 330 N.W.2d 513, 517 (N.D. 1983) ("If we recognize, as we must, that it does not require a genius to draft a complaint it becomes apparent that more is needed than a mere allegation of negligence in a malpractice action."). Where, as here, a party fails to serve an admissible expert affidavit within the three-month timeframe, the Court is required to dismiss the case without prejudice. N.D. CENT. CODE § 28-01-46 ("Any action for injury…alleging professional negligence by a physician…or by any other health care organization…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.").

McKibbage failed to comply with the requirements of Section 28-01-46 of the North Dakota Century Code and the District Court erred in failing to dismiss Count II of McKibbage's Complaint.

II. McKibbage was required to disclose an admissible expert opinion in support of his direct professional negligence claim against Bone & Joint because, as the District Court correctly held, Section 28-01-46 of the North Dakota Century Code applies to this professional negligence case.

[¶24] Although the District Court erred in concluding McKibbage's purported expert affidavit satisfied the requirements of Section 28-01-46 as to his negligent supervision claim, the District Court did correctly conclude that McKibbage's negligent supervision claim against Bone & Joint is a claim for professional negligence within the meaning of Section 28-01-46. While it is an issue of first impression before this Court, Section 28-01-46 of the North Dakota Century Code undeniably applies to the present action. As the District Court concluded, "[t]he type and amount of supervision, if any, Bone & Joint should have observed for Dr. Dixon,…is an issue of professional medical management to be established by expert testimony." (*Order*, at App. 84-85, ¶ 23). McKibbage has alleged an injury resulting from the professional negligence of a health care organization, Bone & Joint. Due to McKibbage's claims, Section 28-01-46 of the North Dakota Century Code, "requires [him] to come forward with an expert opinion to support the allegations of malpractice" within three months of commencing suit. *Van Klootwyk v. Baptist Home, Inc.*, 2003 ND 112, ¶ 10, 665 N.W.2d 679.

[¶25] As the District Court recognized, McKibbage did not plead his claim for negligent supervision as professional negligence. (*Order*, at App. 83-84, ¶ 20). However, "[i]t is the 'actual nature of the action' or the actual 'nature of the subject matter' which is

determinative." *Krein v. DBA Corp.*, 327 F.3d 723, 726 (8th Cir. 2003) (quoting *Sime v. Tvenge Assocs. Architects & Planners, P.C.*, 488 N.W.2d 606, 609 (N.D. 1992)).

[¶26] A court's primary goal in construing a statute is to discover the intent of the legislature. *Burlington Northern v. State*, 500 N.W.2d 615 (N.D. 1993). To determine the legislature's intent, the language of the statute is examined first. *Rocky Mountain Oil & Gas Ass'n v. Conrad*, 405 N.W.2d 279 (N.D. 1987). Where the "statute's language is clear and unambiguous, the legislative intent is presumed clear on the face of the statute." *Western Gas Resources Inc. v. Heitkamp*, 489 N.W.2d 869 (N.D. 1992), *cert denied*, 507 U.S. 920 (1993); *see also Schmidt v. City of Minot*, 2016 ND 175, ¶ 7, 834 N.W.2d 909 (citing N.D. CENT. CODE § 1-02-02) ("If the language of a statute is clear and unambiguous, the language may not be disregarded."). "Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention appears." *Schmidt*, 2016 ND 175, ¶ 7.

[¶27] Professional negligence is not defined by Section 28-01-46; however, "[t]he dictionary is a good source to determine the plain, ordinary definition of an undefined term." *Hanneman v. Continental W. Ins. Co*., 1998 ND 46, ¶ 31, 575 N.W.2d 445; *see also Martin v. Allianz Life Ins. Co.*, 1998 ND 8, ¶ 9, 573 N.W.2d 823 (noting the ordinary meaning is the definition a non law-trained person would attach to the term); *Kim-Go v. J.P. Furlong Enters, Inc.*, 460 N.W.2d 694, 696 (N.D. 1990) (relying on a dictionary to define "proportion"). As to the definition of professional negligence, Black's Law Dictionary provides, "See Malpractice." Black's Law Dictionary 1329 (9th ed.). Malpractice, in turn, is defined as "[a]n instance of negligence or incompetence on the part

of a professional." *Id*. at 1044. This definition is also consistent with this Court's holding in *Beaudoin v. South Texas Blood & Tissue Ctr.*:

> Malpractice is the failure of one rendering professional services to exercise the degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession, which results in injury, loss, or damage to the recipient of those services or those entitled to rely upon them.

2004 ND 49, ¶ 8, 676 N.W.2d 103. "Profession" is defined "to encompass specialized knowledge and intensive preparation in skills as well as the scholarly principles underlying such skills." *Kuntz v. Muehler*, 1999 ND 215, ¶ 9, 603 N.W.2d 43. "[T]he labor and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual," distinguishing a profession from a trade. *Id.*; *see also Jilek v. Berger Elec., Inc.*, 441 N.W.2d 660, 663 (N.D. 1989) (distinguishing between physicians, surgeons, dentists, pharmacists, oculists, attorneys, accountants, and engineers as professionals and airline pilots, precision machinists, electricians, carpenters, blacksmiths, and plumbers as individuals practicing a skilled trade).

[¶28] McKibbage claims he developed a hematoma and signs and symptoms consistent with cauda equina syndrome following an instrumented lumbar fusion performed by Dr. Dixon on March 7, 2017. (*Complaint*, at App. 11-12, ¶ 8). McKibbage further claims that the second surgery Dr. Dixon performed on March 29, 2017 to evacuate the hematoma was too late to reverse the sequelae of the cauda equina syndrome. *Id*. at App. 12, ¶ 9. McKibbage contends Dr. Dixon failed to surgically intervene in a timely and emergent fashion, allowing the hematoma to remain compressing the thecal sac from March 7, 2017 to March 29, 2017. *Id*. at App. 12, ¶ 13(a)-(e).

[¶29] As it pertains to his negligent supervision claim, McKibbage contends Bone & Joint did not promulgate adequate rules for its agents and employees, including Dr. Dixon, and

did not adequately supervise its agents or employees either. *Id*. at App. 13-14, ¶¶ 17(a)-(b). In other words, McKibbage suggests Bone & Joint negligently supervised Dr. Dixon, an orthopedic spine surgeon with a spine fellowship licensed to practice medicine in the State of North Dakota, including while he performed the instrumented lumbar fusion on McKibbage and cared for him post-operatively. (*Defendant Daniel Dixon, M.D.'s Answer to Plaintiff's Complaint and Demand for Jury Trial*, App. 23, ¶ 2). By definition, McKibbage has alleged a claim for professional negligence against Bone & Joint on a theory of negligent supervision.

[¶30] Courts lack the "authority to rewrite unambiguous statutes to correct alleged legislative 'oversights,' and [courts] are not free to 'amend' or 'clarify' the plain language of a statute under the guise of statutory interpretation." *Riemers v. Jaeger*, 2018 ND 192, ¶ 11, 916 N.W.2d 113. It is for the Legislature to effectuate a change to the plain language of a statute. *Id*. There is nothing ambiguous about the plain language of Section 28-01-46 and its application to McKibbage's claim against Bone & Joint for negligent supervision.

[¶31] This conclusion is also consistent with this Court's precedent, routinely holding that technical surgical procedures are beyond the understanding of a layperson. *See Haugenoe*, 2003 ND 92, ¶ 11, 663 N.W.2d 175, *Jaskoviak,* 2002 ND 1, ¶ 9, 638 N.W.2d 1 (requiring expert testimony to establish the likelihood of a risk and the type of harm in question); *Kunnanz v. Edge,* 515 N.W.2d 167, 172 (N.D. 1994) (holding expert medical opinions must be expressed in terms of reasonable medical certainty or probability, not mere possibility, to support a finding of medical negligence); *Larsen,* 498 N.W.2d at 195 (Laypeople require the benefit of expert testimony for medically technical procedures because any alleged injuries resulting from the procedure are not the type that could occur

if there was negligence). If expert testimony is required to establish the underlying allegations of medical malpractice against Dr. Dixon, the jury similarly requires expert testimony to understand what level of supervision, if any, Bone & Joint was required to undertake of Dr. Dixon's medical practice.

[¶32] Courts in other jurisdictions presented with the same or similar inquiry have reached the same conclusion Bone & Joint urges this Court to adopt. *See Trowell v. Providence Hosp. & Med. Centers, Inc.,* 918 N.W.2d 645 (Mich. 2018) (finding a claim is one for professional negligence when it involves "questions of professional medical management and not issues of ordinary negligence that can be judged by the common knowledge and experience of a jury."); *Szymborski v. Spring Mountain Treatment Ctr*., 403 P.3d 1280, 1288 (Nev. 2017) (explaining negligent hiring, supervision, and retention claims are all within expert affidavit statute where the underlying facts of the case fall within the definition of medical malpractice); *Oduok v. Fulton Dekalb Hosp. Auth*., 797 S.E.2d 133, 138 (Ga. Ct. App. 2017) (dismissing negligent hiring, retention, and supervision claims against Defendant hospital for Plaintiff's failure to produce an expert affidavit as required under Georgia's expert affidavit statute); *Buchanan v. O'Donnell*, 340 S.W.3d 805, 812–13 (Tex. App. 2011) (holding claims for negligent hiring, supervision, training, and retention against Defendant hospital are health care liability claims as these types of claims are inseparable from the rendition of health care, requiring an expert affidavit under Texas's expert affidavit statute).

[¶33] To allow McKibbage's claim for negligent supervision to proceed without expert testimony in this respect would improperly result in the jury's speculation regarding McKibbage's alleged injury. *McDonnell v. Monteith*, 231 N.W. 854, 857 (N.D. 1930)

(holding an award for damages cannot be sustained if a jury is left to conjecture or speculate regarding causation). It also defeats the very purpose of Section 28-01-46.

III. This Court should exercise its supervisory jurisdiction to rectify the District Court's error and prevent injustice because Bone & Joint has no other adequate remedy.

[¶34] This Court has jurisdiction to review this case and issue a supervisory writ pursuant to Article VI, Section 2 of the North Dakota Constitution. *Pierce v. Anderson,* 2018 ND 131, 912 N.W.2d 291; *Trinity Med. Ctr. v. Holum,* 544 N.W.2d 148, 150 (N.D. 1996); *Herringer v. Haskell,* 536 N.W.2d 362, 364 (N.D. 1995). This Court may exercise its authority to issue a supervisory writ to control the district courts in instances where it must rectify errors. *Holum,* 544 N.W. 2d at 150. This Court may further issue supervisory writs to "prevent injustice in extraordinary cases where no adequate remedy exists." *Id.* This Court should exercise its supervisory authority over this matter as the District Court's November 16, 2020 Order denying Bone & Joint's Motion to Dismiss is inconsistent with the statute and precedent and creates an injustice for which Bone & Joint has no adequate alternative remedy.

[¶35] The above analysis establishes the District Court erred in finding that McKibbage's expert affidavit, which does not address his direct professional negligence claim against Bone & Joint, satisfied the statutory requirements of Section 28-01-46. That this error creates an injustice for which Bone & Joint has no adequate remedy goes without saying. The Order in question is not appealable and Bone & Joint is left in a position of trying the claim, including engaging in medical and fact discovery related to the same, where McKibbage failed to satisfy explicit statutory requirements. *See State v. Haskell,* 2001 ND 14, ¶ 4, 621 N.W.2d 358 ("the denial of a motion to dismiss is not appealable").

[¶36] This Court has exercised its supervisory authority under such extraordinary circumstances before. For example, in *Pierce v. Anderson,* this Court exercised its supervisory authority to review the denial of a motion to dismiss involving Section 28-01-46 specifically because there was no adequate alternative remedy. 2018 ND 131, 912 N.W.2d 291. The central inquiry in *Pierce* was whether the obvious occurrence exception to Section 28-01-46 applied, as the District Court had held. *Id.* at ¶ 5. In addressing this question, this Court noted "supervisory jurisdiction may be warranted where a denial of a 'motion to dismiss contradicts North Dakota statutes and this Court's precedent.'" *Id.* at ¶ 7. This Court further recognized "the statute requiring an expert affidavit in professional negligence cases was enacted to prevent an actual trial in such cases where a medical malpractice plaintiff cannot substantiate a basis for the claim." *Id.* This Court issued a supervisory writ, reversing the District Court's decision to deny the Motion to Dismiss, because the District Court's decision was inconsistent with applicable law and the Petitioners lacked an adequate alternative remedy. *Id.* "Although this issue could be raised on a later appeal, the purpose of the statute is to prevent an actual trial." *Id.*

[¶37] As the *Pierce* Court outlined, the issue in question here is a statutory reprieve from suit, not merely a defense to liability. *Greenwood v. Paracelsus Health Corp., of N.D., Inc.,* 2001 ND 28, ¶ 8, 622 N.W.2d 195 (Section 28-01-46 was "specifically designed to dispose of frivolous or nuisance medical malpractice actions at an early stage of the proceedings" and "to prevent the necessity of an actual trial in such cases."). This statutory protection is effectively lost if a claim is erroneously permitted to proceed to trial. *See also State v. Haskell*, 2001 ND 14, 621 N.W.2d 358 (exercise of supervisory authority is appropriate to review a district court's denial of a motion to dismiss for failure to file a

notice of claim required by statute); *Continental Res., Inc. v. Schmalenberger*, 2003 ND 26, ¶ 7, 656 N.W.2d 730 (exercise of supervisory authority is appropriate to review a district court's denial of a motion to disqualify counsel as it would be impossible to return the parties to the status quo if the case was allowed to proceed to judgment before presentation of the disqualification issue); *Mitchell v. Sanborn*, 536 N.W.2d 678, 683 (N.D. 1995) (exercise of supervisory authority is appropriate where there exists a "reasonable suggestion that expensive and extensive medical discovery would be necessary before a trial on damages"). This Court has consistently exercised its supervisory authority where such fundamental interests of litigants are at stake. *See North Dakota Comm'n on Med. Competency v. Racek,* 527 N.W.2d 262 (N.D. 1995); *Central Power Elec. Co-op, Inc., v. C-K, Inc.,* 512 N.W.2d 711 (N.D. 1994); *B.H. v. K.D.,* 506 N.W.2d 368 (N.D. 1993).

[¶38] *Pierce* alone supports the exercise of supervisory authority in this case. In addition, the statutory protection in question is analogous to immunity and subject matter jurisdiction and this Court has repeatedly exercised its supervisory jurisdiction over a non-appealable order denying a motion to dismiss for lack of subject matter jurisdiction and over a non-appealable order denying a motion to dismiss premised on immunity. *See Trinity Hospitals v. Mattson,* 2006 ND 231, 723 N.W.2d 684 (exercise of supervisory authority is appropriate to review denial of motion to dismiss where defendant was entitled to immunity from suit); *Haskell,* 2001 ND 14, ¶ 4, 621 N.W.2d 358 (supervisory writ warranted to review denial of motion to dismiss where employee failed to present the statutorily-required notice of claim); *Diamond v. State Bd. of Higher Educ.,* 1999 ND 228, 603 N.W.2d 66 (proper circumstances existed to justify exercise of supervisory jurisdiction over interlocutory order denying Board of Higher Education's motion to dismiss tenured university

professor's action, where trial court lacked subject matter jurisdiction to hear professor's claim for breach of his employment contract because professor failed to allege he presented notice of his claim to any state entity as required by statute).

[¶39] It is also self-evident that this case embodies important public interests. As set forth above, the Legislature enacted Section 28-01-46 of the North Dakota Century Code as a preliminary screening mechanism for "totally unsupported claims," and it "seeks to prevent protracted litigation when a medical malpractice plaintiff cannot substantiate a basis for the claim." *Greenwood,* 2001 ND 28, ¶ 8, 622 N.W.2d 195. The statute was further "specifically designed to dispose of frivolous or nuisance medical malpractice actions at an early stage of the proceedings" and "to prevent the necessity of an actual trial in such cases." *Id.* The statute, thus, is designed to prevent prolonged litigation in the absence of an admissible expert affidavit. *Larsen,* 498 N.W.2d at 192. Certainly, the statute protects the interests of private litigants in that it prevents unnecessary and expensive discovery and trial preparation. It is also undeniable that the statute serves to promote judicial efficiency and economy in that it avoids the gratuitous waste of judicial time and resources. This is true whether Section 28-01-46 applies to dismiss an entire Complaint or a single claim, as is the case here.

CONCLUSION

[¶40] For the reasons outlined above, Bone & Joint respectfully requests this Court take original jurisdiction of the above-referenced matter, and reverse the District Court's denial of Bone & Joint's Motion to Dismiss. Bone & Joint submits this Petition for Supervisory Writ with a request for oral argument before the North Dakota Supreme Court.

Respectfully submitted December 22, 2020.

VOGEL LAW FIRM

By: /s/ Briana L. Rummel

Brenda L. Blazer (#04155)
Briana L. Rummel (#08399)
US Bank Building
200 North 3rd Street, Suite 201
PO Box 2097
Bismarck, ND 58502-2097
Telephone: 701.258.7899
Email: bblazer@vogellaw.com
brummel@vogellaw.com
ATTORNEYS FOR PETITIONER

CERTIFICATE OF COMPLIANCE

[¶41] Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 28 pages.

Dated this 22 day of December, 2020.

VOGEL LAW FIRM

/s/ Briana L. Rummel

BY: Brenda L. Blazer (#04155)
Briana L. Rummel (#08399)
US Bank Building
200 North 3rd Street, Suite 201
PO Box 2097
Bismarck, ND 58502-2097
Telephone: 701.258.7899
Email: bblazer@vogellaw.com
brummel@vogellaw.com
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The Bone & Joint Center, P.C., Petitioner, vs. The Honorable Thomas Schneider, Judge of the District Court, South Central Judicial District, Respondent.	**SUPREME COURT NO.** Civil No. 08-2019-CV-00640

AFFIDAVIT OF SERVICE

Brenda L. Blazer (#04155)
Briana L. Rummel (#08399)
VOGEL LAW FIRM
Attorneys for Petitioner
US Bank Building
200 North 3rd Street, Suite 201
PO Box 2097
Bismarck, ND 58502-2097
Telephone: 701.258.7899
Email: bblazer@vogellaw.com
brummel@vogellaw.com

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Alicia Rash, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on December 22, 2020, **Petition for Supervisory Writ Oral Argument Requested and Appendix of Petitioner The Bone & Joint Center, P.C.** were filed electronically with the Clerk of Court of the North Dakota Supreme Court through the Supreme Court E-Filing Portal, and that the same documents were electronically served through the portal:

Tom Conlin – tom@conlinlawfirm.com
Stacy Stennes – stacy@conlinlawfirm.com
Taylor Cunningham – taylor@conlinlawfirm.com
Lisa Levine - lisa@floridainjuryclaim.com
Tracy Kolb – tkolb@meagher.com
James McAlpine - jmcalpine@quinlivan.com
Steven Schwegman - SSchwegman@quinlivan.com
Paul Darsow - pdarsow@quinlivan.com

and by US Mail to:

Honorable Judge Schneider
Morton County Courthouse
210 Second Ave. N.W.
Mandan, North Dakota 58554

Alicia Rash

Subscribed and sworn to before me this 22 day of December, 2020.

CHELSEY TERNES
Notary Public
State of North Dakota
My Commission Expires Sept 21, 2021
(SEAL)

Notary Public