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Health - Malpractice, Negligence, or Breach of Duty: The North Dakota Supreme Court Holds that the Performance of a Surgery Other than the One Identified on a Consent Form does not Constitute an Obvious Occurrence of Professional Negligence

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HEALTH - MALPRACTICE, NEGLIGENCE, OR BREACH OF DUTY: THE NORTH DAKOTA SUPREME COURT HOLDS THAT THE PERFORMANCE OF A SURGERY OTHER THAN THE ONE IDENTIFIED ON A CONSENT FORM DOES NOT CONSTITUTE AN OBVIOUS OCCURRENCE OF PROFESSIONAL NEGLIGENCE

Cartwright v. Tong, 2017 ND 146, 896 N.W.2d 638.

ABSTRACT

In *Cartwright v. Tong*, the North Dakota Supreme Court *held* that the performance of a surgery different than the one consented to was not an "obvious occurrence" of negligence within the meaning of North Dakota Century Code Section 28-01-46, and therefore, was not exempt from the statute's requirement to provide expert opinion within three months of commencing a medical malpractice suit. The Defendant, Dr. Beverly Tong, removed Plaintiff Roxane Cartwright's fallopian tubes, rather than performing the tubal ligation Cartwright had consented to. The North Dakota Supreme Court found that the occurrence was not obvious because the case involved technical procedures that the average person did not understand, and it was not clear what had led Tong to perform the different procedure. The Dissent criticized the majority's holding, arguing that the obvious occurrence exception did apply. In this case, there were conflicting opinions over what the "occurrence" was, which exposes how detrimental this basic determination is for a plaintiff wanting to claim that such occurrence is obvious. Further, the broad application of the technical procedure guideline in this case raises the problems with employing such a rule without an analysis separating the technical issues from the ordinary fact questions. Overall, *Cartwright* exposes a need for more analytical guidelines that would aid attorneys in accurately determining whether their cases have the ability to progress past the early stages of litigation without expert testimony.

I. FACTS

Throughout her fourth pregnancy, twenty-nine-year-old Roxane Cartwright ("Cartwright") met with her doctor, Beverly Tong ("Tong"), to discuss options for post-partum contraception.[1] Initially interested in an intrauterine device (IUD), Cartwright ultimately decided on tubal ligation based on her discussions with Tong.[2] Cartwright said that Tong had also referred to a new procedure called a bilateral salpingectomy, in which the fallopian tubes were removed instead of "tied."[3] According to Cartwright[4], she stressed that she did not want her fallopian tubes removed because she wanted to have the option of reversal that came with the tubal ligation procedure.[5] The hospital's procedure records noted that Cartwright desired, and was approved for, tubal ligation on November 23, 2011.[6] Cartwright apparently authorized and consented to a "Caesarean delivery with tubal ligation" on May 7, 2012.[7] Tong's notes from May 7, 2012, found in Cartwright's medical records, indicated she discussed the risks of tubal ligation with Cartwright.[8]

On May 16, 2012, Tong performed a Caesarean delivery, followed by a bilateral salpingectomy, in which she removed Cartwright's fallopian tubes.[9] Procedure notes from that time state, "Presents for repeat Cesarean section with bilateral tubal ligation. The risks of tubal ligation include risk of failure of 3 to 7/1,000, however is lower for this salpingectomy . . . understanding all these issues, she does desire to proceed."[10] Medical records further referred to both "completion of the tubal ligation" and "completion of the salpingectomy."[11] The records additionally noted there were not any complications.[12] Tong did not allege she had a medical reason to perform a different

1. Brief of Appellants at ¶¶ 8, 17, Cartwright v. Tong, 2017 ND 146, 896 N.W.2d 638 (No. 20160293), 2017 WL 749300.

2. *Id*. at ¶ 8.

3. *Id*. at ¶ 9.

4. It is not clear whether Cartwright's allegations are undisputed. Cartwright's attorney said the facts were undisputed in the sense that they were not met with additional admissible evidence to overcome the allegations. Oral Argument at 17:09, 19:00, *Cartwright*, 896 N.W.2d 638 (No. 20160293), http://www.ndcourts.gov/court/docket/20160293.htm.

5. Brief of Appellants, *supra* note 1, at ¶ 9.

6. *Id*. at ¶¶ 10-11.

7. *Id*. at ¶ 8; *see also* Appellee Brief at ¶ 7, Cartwright v. Tong, 2017 ND 146, 896 N.W.2d 638 (No. 20160293), 2017 WL 749300.

8. Brief of Appellants, *supra* note 1, at ¶ 11.

9. *Id*.; *see also* Appellee Brief, *supra* note 7, at ¶ 7.

10. Brief of Appellants, *supra* note 1, at ¶ 11.

11. Cartwright v. Tong, 2017 ND 146, ¶ 28, 896 N.W.2d 638, 645.

12. Brief of Appellants, *supra* note 1, at ¶ 11.

procedure.[13] Following the procedure, the facts appear to show that Cartwright was never informed that a different procedure had been performed.[14]

In the next two years, Roxane and her husband, Tim, worked to adopt a daughter from the Marshall Islands.[15] Because the process was going slowly, Roxane made an appointment with Dr. Tong to discuss tubal ligation reversal.[16] Allegedly, it was at that appointment, in February 2014, when Roxane first found out that her fallopian tubes had been removed almost two years earlier.[17] On May 8, 2014, Roxane and Tim Cartwright sued Dr. Tong and Great Plains Women's Health Center, P.C., for professional negligence.[18] They alleged that Dr. Tong negligently expanded the scope of Roxane Cartwright's consent[19] by performing a different surgery than Roxane had originally consented to.[20] The defendants denied liability and later moved to dismiss the action based on the Cartwrights' failure to provide expert testimony establishing a prima facie case for medical negligence within three months of commencing the action, as required by N.D.C.C. § 28-01-46.[21] In the alternative, defendants made a motion for summary judgment.[22] The district court did not address the issue of obvious occurrence.[23] Rather, the court sided with Tong and Great Plains, and entered a judgment dismissing the Cartwrights' complaint.[24] The Cartwrights appealed[25] to the North Dakota Supreme Court, which affirmed.[26]

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13. *Cartwright*, ¶ 36, 896 N.W.2d at 647.

14. Brief of Appellants, *supra* note 1, at ¶ 11; *see also* Appellee Brief, *supra* note 7, at ¶ 8.

15. Brief of Appellants, *supra* note 1, at ¶ 11; *see also* Cartwright, ¶ 3, 896 N.W.2d at 640.

16. Brief of Appellants, *supra* note 1, at ¶ 11; *see also* Cartwright, ¶ 3.

17. Brief of Appellants, *supra* note 1, at ¶ 11; *see also* Cartwright, ¶ 3.

18. *Cartwright*, ¶ 2, 896 N.W.2d at 640.

19. The Court noted this case could have been analyzed as a "medical battery case" due to the allegation of a "total lack of consent," but analyzed the case as negligence because the Cartwrights asserted negligence. *Id*. at ¶ 36, 896 N.W.2d at 647 n.1.

20. *Id*. ¶ 14 n.1.

21. Brief of Appellants, *supra* note 1, at ¶ 3.

22. *Cartwright*, ¶ 4, 896 N.W.2d at 640-641.

23. *Id*. ¶ 11, 896 N.W.2d at 642.

24. *Id*.

25. Although a dismissal without prejudice cannot usually be appealed, such dismissals may be appealable "if the plaintiff cannot cure the defect that led to the dismissal, or if the dismissal has the practical effect of terminating the litigation in the plaintiff's chosen forum." Here, the Court found that Roxane Cartwright could appeal the decision because the statute of limitations had run, effectually precluding any future action. *Id*. ¶¶ 5-7, 896 N.W.2d at 641 (quoting Rodenburg v. Fargo-Moorhead YMCA, 2001 ND 139, ¶ 13, 632 N.W.2d 407, 413).

26. *Id*. ¶ 23, 896 N.W.2d at 645.

II. LEGAL BACKGROUND

In North Dakota, plaintiffs alleging professional negligence are required to produce an expert opinion affidavit supporting a prima facie case of their claim within three months of commencing the action.[27] This requirement is codified by North Dakota Century Code § 28-01-46, which requires dismissal where the plaintiff fails to do so.[28] Nonetheless, plaintiffs are not required to obtain such affidavits where the case involves an "obvious occurrence."[29] The crucial question, therefore, is what constitutes an "obvious occurrence."

A. OVERVIEW OF MEDICAL NEGLIGENCE AND THE OBVIOUS OCCURRENCE EXCEPTION

Actions for "ordinary negligence" can be established and understood through "common everyday experience."[30] Medical malpractice deviates from ordinary negligence when the act complained of involves a "science or art requiring special skills not ordinarily possessed by lay persons."[31] Generally, a plaintiff may establish a prima facie case of medical malpractice by providing expert testimony demonstrating the standard of care, breach of that standard of care, and that the breach caused the injury complained of.[32] Section 28-01-46 of the North Dakota Century Code requires a plaintiff alleging medical malpractice to provide this expert opinion very early in the lawsuit.[33] The statute states, in relevant part:

> Any action for injury or death alleging professional negligence by a physician, nurse, hospital…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.[34]

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27. *Id.* ¶ 10, 896 N.W.2d at 642.
28. *Id.*
29. *Id.*
30. Sime v. Tvenge Assocs. Architects & Planners, P.C., 488 N.W.2d 606, 609 (N.D. 1992).
31. *Id.* (quoting Berger v. State, 171 A.D.2d 713, 717 (N.Y. App. Div. 1991)).
32. Winkjer v. Herr, 277 N.W.2d 579, 583 (N.D. 1979).
33. STUART M. SPEISER, THE NEGLIGENCE CASE: RES IPSA LOQUITUR § 5:5.60 (2017); N.D. CENT. CODE § 28-01-46 (2017).
34. N.D. CENT. CODE § 28-01-46 (2017).

However, the statute also provides exceptions by listing the occurrences for which an expert opinion affidavit will not be required. These include 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.[35]

The explicit exceptions—failure to remove a foreign substance and performance of a medical procedure on the wrong patient, organ, limb, or other part of the body—should seem familiar to first-year Torts students, as they are classic examples of *res ipsa loquitur*.[36] The more difficult language to decipher is "other obvious occurrence." To understand the "obvious occurrence" provision, it is necessary to consider the context in which such expert affidavit statutes arose, the relationship of the statute to the doctrine of *res ipsa loquitur*, and modern methods of analysis used by the North Dakota Supreme Court.

B. N.D.C.C. § 28-01-46 AND OTHER EXPERT AFFIDAVIT STATUTES

In the mid-1970s, the amount of medical malpractice lawsuits soared, eventually causing many state legislatures to enact statutory provisions designed to reduce liability and expedite the judicial process for medical malpractice cases.[37] Jurisdictions took different approaches, such as creating statutes of limitations for medical malpractice, requiring arbitration or review panels prior to trial, and limiting possible recovery amounts and contingent fees.[38] Some jurisdictions enacted statutes requiring an expert affidavit of merit in order to maintain medical malpractice suits.[39] In many of the jurisdictions enacting such statutes, there is a question as to whether the doctrine of *res ipsa loquitur* precludes a plaintiff from having to comply with the requirements of the statute.[40]

35. *Id*.

36. SPEISER, *supra* note 33.

37. Holly Piehler Rockwell, Annotation, *When Patient Claims Against Doctor, Hospital, or Similar Health Care Provider are not Subject to Statutes Specifically Governing Actions and Damages for Medical Malpractice*, 89 A.L.R. 4th 887 (1991).

38. *Id*.

39. 54 C.J.S. *Physicians and Surgeons* § 142 (2017).

40. SPEISER, *supra* note 33.

1. Relationship Between Res Ipsa Loquitur and the "Obvious Occurrence" in N.D.C.C. § 28-01-46

In 1981, the North Dakota Legislature passed its own version of the "affidavit of merit" statute: N.D.C.C. § 28-01-46.[41] The statute itself "provides examples of obvious occurrences of negligence . . . . that trigger res ipsa loquitur."[42] These include the "unintentional failure to remove a foreign substance"; medical procedures done on the wrong patient, organ, limb, or other body part; "or other obvious occurrence."[43] Through this provision, the North Dakota Legislature defined the doctrine of *res ipsa loquitur* with regards to medical malpractice cases.[44]

The courts have chosen to interpret the catch-all phrase "or other obvious occurrence" narrowly.[45] In *Larsen v. Zarrett*, the North Dakota Supreme Court stated:

> 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 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.' By enacting § 28-01-46, the Legislature has…given [res ipsa loquitur] a scope which is, perhaps, even more narrow than and limited than our case law on the doctrine which preceded the statute's enactment.[46]

In the same case, the Court found the obvious occurrence exception would only apply to cases "plainly within the knowledge of a layperson."[47]

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41. Fortier v. Traynor, 330 N.W.2d 513, 516 (N.D. 1983).

42. Strand v. Sanford Health Fargo, No. 09-2014-CV-1738, 2014 WL 11191268, at *4 (D. N.D. Sept. 23, 2014) (citing Maguire v. Taylor, 940 F.2d 375, 377 (8th Cir. 1991)).

43. N.D. CENT. CODE § 28-01-46 (2017).

44. SPEISER, *supra* note 33. For this reason, this comment will refer to "*res ipsa loquitur*" and "exceptions to N.D.C.C. § 28-01-46" or "obvious occurrences," interchangeably.

45. *Id*.

46. Larsen v. Zarrett, 498 N.W.2d 191, 194 (N.D. 1993) (citations omitted).

47. *Id*. at 195.

2. Exceptions to Expert Affidavit Statutes in Other Jurisdictions

In the United States as a whole, there are various statutes which require some sort of expert opinion in medical malpractice cases.[48] In fact, over half of the states have such statutes.[49] Some of these states have strict statutes, requiring an expert affidavit without exception.[50] In these states, an expert affidavit is necessary even where *res ipsa loquitur* is implicated in the action.[51] Other states explicitly exempt claims involving *res ipsa loquitur* from their statutes.[52] For example, New York's affidavit of merit statute provides:

> (c) Where the attorney intends to rely solely on the doctrine of 'res ipsa loquitur,' this section shall be inapplicable. In such cases, the complaint shall be accompanied by a certificate, executed by the attorney, declaring that the attorney is solely relying on such doctrine and, for that reason, is not filing a certificate required by this section.[53]

Finally, there are statutes that require expert opinion, but provide exceptions using language that resembles *res ipsa loquitur*.[54] North Dakota's statute, N.D.C.C. § 28-01-46, falls into this category, and it appears that Delaware is similar.[55] Delaware's statute provides that affidavits of merit:

> '[S]hall be unnecessary if the complaint alleges a rebuttable inference of medical negligence,' which arises where the plaintiff produces evidence showing the injury arose in one of three specific circumstances: (1) a 'foreign object was unintentionally left within the body of the patient following surgery; (2) [a]n explosion or fire originating in a substance used in treatment occurred in the course of

48. Jeffrey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 B.Y.U. L. REV. 537, 552 (1997).

49. Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217, 225 (2010).

50. SPEISER, *supra* note 33. *See generally* ARIZ. REV. STAT. ANN. § 12-2603 (2017); NEV. REV. STAT. § 41A.071 (2015); N.J. STAT. ANN. § 2A:53A-27 (West 2004).

51. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2013); Sherman v. HealthSouth Specialty Hosp., Inc., 397 S.W.3d 869, 876 (Tex. App. 2013) ("the limited liability of res ipsa loquitur in health care liability cases…is not an exception to section 74.351's expert report requirement").

52. SPEISER, *supra* note 33.

53. N.Y. C.P.L.R. § 3012-a (MCKINNEY 2017).

54. SPEISER, *supra* note 33.

55. *Id.*

> treatment; or (3) [a] surgical procedure was performed on the wrong patient or the wrong organ, limb or part of the patient's body.'[56]

In Delaware, *res ipsa loquitur* can only be applied in these circumstances because the Court has found that the legislature clearly required expert testimony in all medical malpractice cases falling outside of these enumerated exceptions.[57] Though the Delaware and North Dakota statutes are similar in that both narrow the availability of *res ipsa loquitur*,[58] Delaware's legislature chose to state what occurrences were obvious, and did not include any reference to a possible "other" occurrence.[59]

C. MODERN GUIDELINE: CASES INVOLVING TECHNICAL SURGICAL PROCEDURES DO NOT INVOLVE OBVIOUS OCCURRENCES

Expert testimony is not needed in an "obvious occurrence" case because the average person can understand negligence has occurred without information from an expert.[60] In cases involving technical surgical procedures, plaintiffs are unable to rely on obvious results following a surgery to invoke the obvious occurrence exception.[61] Rather, to claim an "obvious occurrence," the plaintiff must show that the occurrence (i.e., the procedure) itself was obvious.[62] Because technical surgical procedures are generally recognized as being beyond the understanding of laypersons,[63] the North Dakota Supreme Court has been prone to denying the "obvious occurrence" exception in cases that involve technical procedures.[64]

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56. DEL. CODE ANN. tit. 18, § 6853 (2017).

57. Williams v. Dyer, No. 91C-11-010, 1992 WL 240477, at *2 (Del. Aug. 12, 1992) (citations omitted).

58. *Id*. at *1; Larsen v. Zarrett, 498 N.W.2d 191, 194 (N.D. 1993).

59. It appears that North Dakota is the only expert affidavit statute state with an exception using such 'catch-all' language. Goldberg Segalla, *50-State Survey of Affidavit of Merit Statutes*, Professional Liability Matters (Feb. 2015), http://professionalliabilitymatters.com/wp-content/uploads/2015/02/GS-3471935-v3-PL_Matters_AOM_Chart_REVISED.pdf.

60. Greene v. Matthys, 2017 ND 107, ¶ 13, 893 N.W.2d 179, 183 (citing *Larsen*, 498 N.W.2d at 195)).

61. *Id*. ¶ 14, 893 N.W.2d at 184.

62. *Id*.

63. *Larsen*, 498 N.W.2d at 195 (citing Maguire v. Taylor, 940 F.2d 375, 377 (1991); Lemke v. United States, 557 F.Supp. 1205, 1211 (1983)).

64. *See Larsen*, 498 N.W.2d 191 (holding that severe pain and numbness following a surgery for hemorrhoids and an inguinal hernia involved technical procedures beyond the understanding of a layperson); Haugenoe v. Bambrick, 2003 ND 92, 663 N.W.2d 175 (holding that a surgical open reduction and internal fixation of the elbow resulting in a misaligned elbow with missing bone fragments was a technical surgical procedure beyond the understanding of a layperson); Greene v. Matthys, 2017 ND 107, 893 N.W.2d 179 (holding that hip surgery resulting in one leg being two inches

Nonetheless, there is a difference between technical matters and ordinary questions of fact. The average case of medical malpractice encompasses more than just medical and technical issues; they involve ordinary questions of fact as well.[65] While the purpose of expert testimony is to help laypersons understand medical and technical aspects of a case, laypersons can decide ordinary fact questions on their own.[66] If an expert's opinion will not be helpful in resolving an issue, or it is difficult to determine what such testimony would even consist of, the issue is likely an ordinary question of fact that laypersons are capable of resolving.[67]

III. THE COURT'S ANALYSIS

In *Cartwright*, the North Dakota Supreme Court, with Justice Crothers writing for the majority, found that the Cartwrights' claim was "not the type of claim that f[ell] within the 'obvious occurrence' exception" to N.D.C.C. § 28-01-46.[68] The Court stated that both procedures—tubal ligation and bilateral salpingectomy—were technical surgical procedures not within the knowledge of laypersons.[69] Moreover, while it may have been obvious that a different surgery was performed, it was not obvious what had led to the occurrence.[70] Because this was not considered a case of "obvious occurrence," the Cartwrights were required to provide expert medical testimony within three months to establish a prima facie case of negligence.[71] In a concurring opinion, Justice McEvers agreed with the majority, specifically noting that Defendant Tong's Answer to the Cartwrights' Complaint, along with medical records Tong submitted in support of her Answer, referred to "tubal ligation" and "salpingectomy" in a manner that made it unclear what the medical terms meant and how the terms were used by medical professionals.[72] The dissent, written by District Judge Herauf, disagreed, arguing that the obvious occurrence "should have been found applicable because it was obvious the wrong procedure was performed."[73]

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longer than the other required expert opinion because hip surgery was a technical surgical procedure beyond the understanding of laypersons).

65. Greenwood v. Paracelsus Health Care Corp. of North Dakota Inc. Corp., 2001 ND 28, ¶ 16, 622 N.W.2d 195, 200.

66. *Id.*

67. *Id.* ¶ 15.

68. Cartwright v. Tong, 2017 ND 146, ¶ 14, 896 N.W.2d at 643 (Justice Crothers was joined by Justices McEvers and Tufte).

69. *Id.* at 642.

70. *Id.* at 643.

71. *Id.* ¶ 17, 896 N.W.2d at 644.

72. *Id.* ¶ 28, 896 N.W.2d at 645.

73. *Id.* ¶ 33, 896 N.W.2d at 646.

A. THE MAJORITY OPINION

Plaintiffs are not required to obtain an expert witness affidavit where the professional negligence is an "obvious occurrence."[74] The Court followed prior case law by refusing to apply the "obvious occurrence" exception to Section 28-01-46, N.D.C.C., where the act complained of involved a technical surgical procedure.[75] The Court analyzed the Cartwrights' claim both as a medical negligence claim and a lack of informed consent claim[76] and concluded that the "obvious occurrence" exception did not apply "[u]nder either theory."[77]

1. Medical Negligence Analysis

Plaintiffs framed their claim as a medical malpractice case in which Dr. Tong "negligently expanded the scope of Roxane Cartwright's original consent" when she removed Roxane's fallopian tubes rather than completing the bilateral tubal ligation Roxane had originally consented to.[78] The Court found that the claim, as stated by the Cartwrights, required an expert witness "to establish Tong's applicable standard of care, violation of that standard and the causal relationship between the violation and the harm complained of."[79] Because it was a technical procedure, the Court decided that an expert witness was required to establish the above elements.[80]

2. Informed Consent Analysis

Based on the wording of the Cartwrights' claim, the defendants argued that the plaintiffs' claim was one of lack of informed consent.[81] While the doctrine of informed consent is a type of negligence, there are slightly different elements required to be established by a plaintiff, which include breach of duty of disclosure, causation, and harm.[82] Unlike the negligence analysis above, it is already an established fact that a physician has a duty "to disclose

74. *Cartwright*, ¶ 10, 896 N.W.2d at 642.
75. *Id.* ¶ 17, 896 N.W.2d at 644.
76. The Court did note that the claim would be better characterized as "medical battery" due to the complete lack of consent, but analyzed it as negligence based on the Cartwrights' claim. *Id.* ¶ 9, 896 N.W.2d at 641 n.1.
77. *Id.* ¶ 17, 896 N.W.2d at 644.
78. *Id.* ¶ 9, 896 N.W.2d at 641.
79. *Id.* ¶ 14, 896 N.W.2d at 643.
80. *Cartwright*, ¶14, 896 N.W.2d at 643.
81. *Id.* ¶ 9, 896 N.W.2d at 641.
82. *Id.* ¶ 15, 896 N.W.2d at 643.

pertinent information to a patient."[83] Nonetheless, the Court pointed to the 2005 amendment of N.D.C.C. § 28-01-46[84] as evidence that expert testimony is required in lack of informed consent cases, and must be used to establish "the medical risks, gravity and type of harm associated with each procedure."[85] The majority held that expert testimony would also be required in an informed consent case because the procedures were outside the common knowledge of laypersons and the record did not establish the necessary elements as listed above.[86]

B. SPECIFICALLY CONCURRING

Justice McEvers agreed and signed with Justice Crothers's majority opinion.[87] Justice McEvers also filed a separate concurring opinion.[88] According to her opinion, she wrote separately "to point out that it would have been helpful for the district court to address the issue of obvious occurrence."[89] In her concurrence, Justice McEvers agreed with the Dissent "that performing a different surgery than was identified on the consent form seem[ed] obvious," but argued that the issue was not that simple.[90] Justice McEvers argued that the medical terms used were not obvious to a layperson and, therefore, the "obvious occurrence" exception would not apply.[91]

1. Justice McEvers Concurrence: Medical Terms for Procedures Are Beyond the Knowledge of a Layperson.

In her concurrence, Justice McEvers focused on the need for expert opinion in order to interpret and understand the medical terms used in Tong's Answer to the Cartwrights' Complaint and medical records submitted by Tong in support of her answer.[92] In her answer, Tong had admitted performing "a bilateral salpingectomy, also known as a tubal ligation."[93] The submitted medical records describing the surgery referred to both "completion

83. *Id.* (quoting *Jaskoviak v. Gruver*, 2002 ND 1, ¶ 13, 638 N.W.2d 1; and *Fortier v. Traynor*, 330 N.W.2d 513, 517 (N.D. 1983)).

84. The 2005 amendment removed "alleged lack of informed consent" from the list of obvious occurrence exceptions to N.D.C.C. §28-01-46. *Id.*

85. *Cartwright*, ¶¶ 16-17, 896 N.W.2d at 643-644.

86. *Id.* ¶ 17, 896 N.W.2d at 644.

87. *Id.* ¶ 26, 896 N.W.2d at 645.

88. *Id.*

89. *Id.*

90. *Id.* ¶ 27, 896 N.W.2d at 645.

91. *Cartwright*, ¶ 28, 896 N.W.2d at 645.

92. *Id.*

93. *Id.*

of the tubal ligation" and "completion of the salpingectomy."[94] Justice McEvers stated that the terms ("tubal ligation" and "salpingectomy") were medical terms for procedures not within the knowledge of a layperson and "[w]hether the terms . . . [were] used interchangeably to describe tubal sterilization [was] . . . beyond the knowledge of a layperson."[95]

C. THE DISSENTING OPINION

Sitting in place of Justice Kapsner, District Judge Herauf wrote the dissent.[96] District Judge Herauf argued that the obvious occurrence exception did apply to the case.[97] While the majority admitted it was obvious Dr. Tong had performed a different surgery than the one Roxane had originally consented to, it found it was not obvious what had led Dr. Tong to perform a different procedure (and that was what would need to be explained by an expert).[98] The dissent disagreed, claiming that it was obvious the surgery performed was different and the negligence was therefore obvious.[99] The dissent further disagreed with the majority's interpretation of the statute, arguing that an "obvious occurrence" establishes a prima facie case on its own.[100]

1. Both the Result and Procedure Performed Were Obviously Wrong

The dissent looked at a recent case, decided within three months[101] of *Cartwright*, *Greene v. Matthys*, to distinguish an obvious occurrence from an obvious result.[102] In *Greene*, the Court had just held that the obvious occurrence exception could only apply if "the occurrence that led to the result, not the result itself" was obvious.[103] The plaintiff in *Greene* had come out of hip surgery with one leg two inches longer than the other.[104] There, the result

94. *Id.*

95. *Id.*

96. *Id.* ¶¶ 25, 30, 896 N.W.2d at 645. (Chief Justice VandeWalle also signed the opinion. The Honorable William Herauf, D.J., sitting in place of Kapsner, J., disqualified).

97. *Cartwright,* 2017 ND 146, ¶ 30, 896 N.W.2d at 646.

98. *Id.* ¶ 14, 896 N.W.2d at 643.

99. *Id.* ¶ 33, 896 N.W.2d at 646.

100. *Id.* ¶ 36, 896 N.W.2d at 647.

101. *Cartwright* was filed on June 13, 2017, while *Greene* was filed April 25, 2017. *See Cartwright*, 2017 ND 146, 896 N.W.2d 638; Greene v. Matthys, 2017 ND 107, 893 N.W.2d 179.

102. *Cartwright*, 2017 ND 146, ¶ 32, 896 N.W.2d at 646.

103. *Id.*

104. *Id.*

(different leg lengths) was obvious, but what had led to the different leg lengths during the technical surgical procedure, was not obvious.[105]

Here, the dissent claimed, it was obvious what led to the result (removed fallopian tubes rather than severed fallopian tubes), and that was that Dr. Tong performed an unconsented to surgical procedure rather than the one that was planned.[106] District Judge Herauf did not think it was necessary that plaintiffs "show there [were] no possible inferences that the reason why the doctor performed the wrong procedure . . . was a result of professional judgment" in order to claim the obvious occurrence exception.[107]

2. It is Wrong to Require Evidence of an Obvious Occurrence When the Obvious Occurrence itself is Meant to Negate the Need for Evidence of Negligence

In his dissent, District Judge Herauf questioned what the majority would require an expert witness to actually show in this case.[108] The dissent disagreed with the notion that Plaintiffs would be required to show the results of the two procedures, including the permanence and likelihood of being able to reverse one over the other.[109] According to District Judge Herauf, the majority essentially requires a medical expert to prove a plaintiff doesn't require a medical expert, and is in conflict with the statute that indicates an expert is not needed if one of the exceptions applies.[110]

In a similar vein, the dissent did not feel Plaintiffs would need to prove "there was no possible medical reason for Tong to remove Cartwright's fallopian tubes, rather than sever them."[111] Again, when the "obvious occurrence" exception listed in the statute applies, a prima facie case is established without the need for evidence for each and every element.[112] With a prima facie case established via an "obvious occurrence," the case would continue to trial and Tong would then have the ability to rebut the Cartwrights' case with other evidence.[113]

105. *Id*.
106. *Id*.
107. *Id*.
108. *Cartwright*, ¶ 35, 896 N.W.2d at 646.
109. *Id*. at 646-647.
110. *Id*. at 647.
111. *Id*. ¶ 36.
112. *Id*.
113. *Id*.

IV. IMPACT OF DECISION

Cartwright has arguably created more difficulties in understanding the "other obvious occurrence" exception of N.D.C.C. § 28-01-46. The many perspectives on what constituted the occurrence in this case raises the need to develop a standard so that attorneys can accurately assess whether the occurrence may be found obvious by the court. Further, the technical surgical procedure reference in this case was used too broadly to make it a good guideline for determining whether a case involves an obvious occurrence. As it stands, *Cartwright* has made it difficult for attorneys to determine whether an obvious occurrence exists, and all but impossible for attorneys to use the exception in any case involving surgical procedures, no matter the context.

A. *CARTWRIGHT* DOES NOT PROVIDE A METHOD FOR DETERMINING WHAT THE "OCCURRENCE" IS IN MEDICAL MALPRACTICE CASES

To determine whether there is an obvious occurrence, it is necessary to determine what the 'occurrence' actually is. In previous cases and this case, the Court has stated that the occurrence is not the bad result, but what causes the resulting injury or damage.[114] However, in *Cartwright*, there were varying opinions as to what the occurrence was that led to the removal of Cartwright's fallopian tubes. Appellant said the occurrence was Tong's decision to expand the scope of Cartwright's consent.[115] The Dissent viewed the performance of the wrong procedure as the occurrence.[116] The Majority argued that the occurrence would be whatever led Tong to performing the wrong procedure.[117]

Any of these occurrences would result in Cartwright's fallopian tubes being removed. The problem is that, depending on the viewpoint of what the occurrence actually is, the "obviousness" of it will be affected. If the occurrence was Tong's decision to expand the scope of Cartwright's consent, expert testimony would not likely be required.[118] Additionally, if the occurrence was the performance of the wrong surgery, as the Dissent argued, it is

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114. *See Greene*, 2017 ND 107, ¶ 14, 893 N.W.2d at 184.

115. Oral Argument at 16:16, *Cartwright*, 896 N.W.2d 638 (No. 20160293), http://www.ndcourts.gov/court/docket/20160293.htm.

116. *Cartwright*, 2017 ND 146, ¶ 33, 896 N.W.2d at 646.

117. *Id.* ¶ 14, 896 N.W.2d at 643.

118. Some of the disputed issues were whether Cartwright consented to the salpingectomy and whether Tong had told Cartwright she would not perform a bilateral salpingectomy. *Id.*; *see also* Oral Argument at 24:07, *Cartwright*, 896 N.W.2d 638 (No. 20160293), http://www.ndcourts.gov/court/docket/20160293.htm (stating that an expert could not testify as to whether Tong told Cartwright she would not perform a bilateral salpingectomy).

clear this could have been found to be an obvious occurrence.[119] The Majority ultimately decided the occurrence was what had led Tong to perform the wrong procedure, and that this occurrence was not obvious because there was no reason provided by Tong.[120]

Cartwright makes clear the importance of determining what the actual occurrence is prior to relying on the obvious occurrence exception to N.D.C.C § 28-01-46. From this case, it is not clear whether the Court will take into account the specific way the plaintiff frames the case. If it is within the Court's discretion, it would be helpful if a more specific guideline could be provided. Otherwise, attorneys face the risk of deciding an occurrence is obvious only to have their entire case changed by the Court's differing viewpoint.

B. LABELING ANY CASE INVOLVING "TECHNICAL SURGICAL PROCEDURES" AS BEYOND THE UNDERSTANDING OF LAYPERSONS MAY BE TOO BROAD

Although *Cartwright* followed precedent in holding that expert testimony is necessary where technical surgical procedures are outside the common knowledge of laypersons,[121] the Court's expanded application of this guideline may render the exceptions found in North Dakota Century Code section 28-01-46 moot. Though *Cartwright* involved the technical procedures of tubal ligation and bilateral salpingectomy, the point of expert testimony in such cases is to show that the doctor's surgical technique was defective in some way.[122] There is a difference "between cases involving the merits of a diagnosis and scientific treatment and cases where, during the performance of surgical or other skilled operations an ulterior act or omission occurs, the judgment of which does not require scientific opinion to throw light upon the subject."[123]

As stated before, if the occurrence here was that Tong negligently expanded the scope of the consent, it is arguable that this is an ordinary fact question. Medical records showed that Cartwright had signed a consent form for a tubal ligation, and a bilateral salpingectomy was performed.[124] During

119. *Cartwright*, ¶ 14, 896 N.W.2d at 634 (majority opinion stating it was obvious Tong performed a different surgery than was allegedly consented to).

120. Tong did not allege she had a medical reason to perform a different procedure. *Id.* ¶ 36, 896 N.W.2d at 647. Also, the medical records stated there were not any complications. Brief of Appellants, *supra* note 1, at ¶ 16.

121. *See Cartwright*, ¶ 17, 896 N.W.2d at 644.

122. *See generally* Ellefson v. Earnshaw, 499 N.W.2d 112, 113 (N.D. 1993).

123. SPEISER, *supra* note 33.

124. *Cartwright*, ¶ 2, 896 N.W.2d at 640.

the oral argument, one of the Justices made the point that an expert could not testify as to what Tong told Cartwright (that she would not perform a bilateral salpingectomy).[125] Therefore, these may have been questions for the jury, involving no need for expert testimony. Given the lack of analysis separating technical and medical questions from ordinary fact questions, it may be difficult for attorneys and their clients to predict how the Court will frame cases involving technical surgical procedures.

Furthermore, precluding cases from the obvious occurrence exception because they involve technical surgical procedures risks direct conflict with N.D.C.C. § 28-01-46. For example, hip surgery is a complex technical surgical procedure that requires expert testimony.[126] Nonetheless, if the hip surgery is performed on the wrong patient, it is an obvious occurrence and does not require expert testimony.[127] Applied too broadly, the general rule that expert testimony is required in cases involving technical procedures would require expert testimony for cases expressly designated as obvious occurrences.[128] Though the application of this rule did not go so far in this case, *Cartwright* raises the possible problems that would stem from such a broad guideline.

V. CONCLUSION

In *Cartwright v. Tong*, the North Dakota Supreme Court focused on the interpretation of a difficult area of North Dakota law: the obvious occurrence exception to the state's expert affidavit statute. However, the analysis offered in the opinion may raise more issues with this provision than it solves. Through this case, it has become clear that even the "occurrence" can be in dispute, which complicates an attorney's ability to assess whether such occurrence is obvious. Additionally, the Court's failure to distinguish between technical issues and ordinary questions of fact was arguably a missed opportunity to allow for more understanding of this area of law, and may prevent such distinctions in the future. Moreover, by broadly excluding obvious occurrences from cases involving technical surgical procedures, the Court risks interfering with the actual statutory provisions explicitly deeming medical

125. Oral Argument at 24:07, *Cartwright*, 896 N.W.2d 638 (No. 20160293), http://www.ndcourts.gov/court/docket/20160293.htm.

126. *See* Greene v. Matthys, 2017 ND 107, ¶¶ 13-14, 893 N.W.2d 179, 183-184.

127. *See* N.D. CENT. CODE § 28-01-46 (2017).

128. During the oral argument, one of the Justices noted that the assumption would be laypeople do not understand how most surgeries work, and concluded it could be said that an expert would be required in obvious cases to say, for example, how you would remove the left arm as opposed to the right arm. Oral Argument at 30:37, *Cartwright*, 896 N.W.2d 638 (No. 20160293), http://www.ndcourts.gov/court/docket/20160293.htm.

procedures with certain results obvious occurrences. Overall, *Cartwright* brings to light certain issues with the obvious occurrence exception that may prompt cautious attorneys to obtain expert affidavits in all medical malpractice cases. Via footnote, the Court also hints that it may be a good idea to carefully consider how such a case should be framed, as "medical battery" may have allowed the plaintiff to avoid such issues.

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