HEALTH—MEDICAL MALPRACTICE DEFENSES: APPLYING GOOD SAMARITAN LAWS TO IN-HOSPITAL EMERGENCIES
Chamley v. Khokha, 2007 ND 69, 730 N.W.2D 864

I. FACTS

Ms. Chamley died after complications arose from her percutaneous nephrostolithotomy.[1] Her longtime urologist, Dr. Salem S. Shahin, performed the initial surgery to remove kidney stones.[2] Post-operatively, Ms. Chamley experienced excessive bleeding.[3] She lost so much blood that she went into shock.[4] She had to be given seven units of replacement blood.[5] The anesthesiologist for her kidney stone removal surgery, Dr. David Skurdal, rated her condition as a life-threatening emergency.[6] In order to locate the source of the internal bleeding, Dr. Shahin performed renal exploration.[7] He determined the kidney needed to be removed.[8]

Due to the presence of scar tissue surrounding Ms. Chamley's kidney, Dr. Shahin anticipated that the surgery would be increasingly complex because he could not visualize all of the blood vessels involved.[9] As a result,

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1. *See* Chamley v. Khokha, 2007 ND 69, ¶¶ 2-3, 730 N.W.2d 864, 866 (establishing that Ms. Chamley died after surgical complications); Brief of Appellee Inder V. Khokha at 7, Chamley v. Khokha, 2007 ND 69, 730 N.W.2d 864 (No. 20060261), 2006 WL 3916956 (explaining that a percutaneous nephrostolithotomy is a surgical procedure performed by inserting a scope into the kidney, using an ultrasound to break up the kidney stones, suctioning out the debris from the stones and inserting a catheter to allow for drainage from the kidney).

2. *Chamley*, ¶ 2, 730 N.W.2d at 865.

3. *Id.*

4. Brief of Appellee Mercy Medical Center at 5, Chamley v. Khokha, 2007 ND 69, 730 N.W.2d 864 (No. 20060261), 2006 WL 3916955; *see also* Brief of Appellee Khokha, *supra* note 1, at 7 (stating Ms. Chamley was "shaking and in shock").

5. Brief of Appellee Khokha, *supra* note 1, at 8 (clarifying that this amount constituted seventy percent of her total body volume).

6. *Id.*; *see also Chamley*, ¶ 2, 730 N.W.2d at 866 (stating that her *vena cava* was damaged). The *vena cava* is a large vein which collects all of the blood from the lower extremities and midsection before returning that blood to the heart. HENRY MORRIS, MORRIS' HUMAN ANATOMY: A COMPLETE SYSTEMATIC TREATISE 775, 777 (J. Parsons Schaeffer ed., 11th ed. 1953) (1893). Damage to the *vena cava* is often hard to manage because there is a great likelihood of resulting damage to multiple organs, and the mortality rate from damage to the *vena cava* is high. Farzad Najam & Gregory D. Trachiotis, *Trauma to the Thoracic Great Vessels*, *in* 44 TRAUMA 5:74 (Harold L. Hirsh ed., 2003).

7. *Chamley*, ¶ 2, 730 N.W.2d at 865.

8. *Id.*

9. Brief of Appellant at 4, *Chamley*, 2007 ND 69, 730 N.W.2d 864 (No. 20060261), 2006 WL 3916957.

he needed assistance in separating the blood vessels while he removed the kidney.[10] He requested the assistance of a staff surgeon, Dr. Wayne Anderson, who declined to help.[11] Subsequently, Dr. Shahin asked Dr. Khokha to assist with Ms. Chamley's surgery.[12] Dr. Khokha was a general surgeon with vascular credentials and had the privileges of a staff physician at Mercy Medical Center.[13]

When he was asked to help, Dr. Khokha was in the physician's lounge waiting to perform a surgery on his own patient.[14] He did not have an explicit obligation to assist Dr. Shahin on Ms. Chamley's surgery.[15] Prior to assisting with the kidney removal, Dr. Khokha did not have a relationship with Ms. Chamley.[16] Dr. Khokha was not on call to assist in surgeries when he was asked to aid Dr. Shahin.[17] He also was not a member of a "code blue" team.[18] Under Dr. Khokha's employment contract, there was no specific requirement for him to render assistance during an emergency situation.[19] Despite these factors, Dr. Khokha chose to assist Dr. Shahin in the surgery.[20]

Mercy Medical Center then billed Ms. Chamley for the services rendered by Dr. Khokha.[21] Under the terms of Dr. Khokha's employment

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10. *See id*. (indicating that Dr. Shahin asked for assistance in removing the kidney).

11. *See Chamley*, ¶ 57, 730 N.W.2d at 878 (stating another staff surgeon declined to help); Brief of Appellee Mercy Medical Center, *supra* note 4, at 8 (stating that Wayne Anderson, a general surgeon, declined to help because he did not think he had the ability to assist with the surgery).

12. *Chamley*, ¶ 2, 730 N.W.2d at 865-66.

13. *Id*. at 866.

14. *Id*.

15. Brief of Appellee Khokha, *supra* note 1, at 9.

16. *Id*.

17. *Id*.

18. *Id*. *See* THE DICTIONARY OF MODERN MEDICINE 125 (J.C. Segen, M.D. ed., 1992) (defining a "code blue" as an emergency announced over the hospital's intercom system indicating that a cardiac arrest was in progress); *see also* MOSBY'S MEDICAL, NURSING & ALLIED HEALTH DICTIONARY 265 (Kenneth N. Anderson et al. eds., 5th ed. 1998) [hereinafter MOSBY'S] (identifying that a "cardiac arrest" is a termination of "cardiac" functioning). The term "cardiac" means relating to the heart. *Id*. The term "code team" is defined as: "[A] specially trained and equipped team of physicians, nurses, and technicians that is available to provide cardiopulmonary resuscitation when summoned by a code set by the institution." *Id*. at 361. "Cardiopulmonary resuscitation" is an emergency procedure for life support including external massaging of the heart and artificial respiration. *Id*. at 271.

19. Brief of Appellee Khokha, *supra* note 1, at 9. *But see* Reply Brief of Appellant at 2, Chamley v. Khokha, 2007 ND 69, 730 N.W.2d 864 (No. 20060261), 2006 WL 3916958 (stating Dr. Khokha's contract obligated him to treat all hospital patients).

20. *Chamley*, ¶ 2, 730 N.W.2d at 866.

21. Brief of Appellant, *supra* note 9, at 6.

contract, he was a salaried physician.[22] Because of this, he was inadvertently paid for the surgeries he performed on Ms. Chamley.[23]

While performing the kidney removal, the *vena cava* tore.[24] It is unclear which physician was responsible for tearing the vein.[25] This tear presented further complications and increased the amount of internal bleeding that was already occurring.[26] Dr. Khokha repaired the tear and stopped the internal bleeding.[27] Post-operatively, Dr. Shahin placed Ms. Chamley in the Intensive Care Unit.[28] The next day, Ms. Chamley was transferred from Mercy Medical Center in Williston to St. Alexius hospital in Bismarck via air ambulance.[29] She was placed under the care of Dr. William Altringer, a vascular surgeon.[30] Upon arrival, Ms. Chamley underwent another surgery.[31] Ms. Chamley died later that day at St. Alexius hospital.[32]

Ms. Chamley's son, William Chamley, brought a wrongful death action against Dr. Khokha, Dr. Shahin, and Mercy Medical Center, alleging professional negligence against the physicians and vicarious liability on behalf of the hospital.[33] Dr. Shahin settled out of the case.[34] The trial court found in favor of the defendants, Mercy Medical Center and Dr. Khokha, on a

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22. *Id*. at 4. Under the terms of Dr. Khokha's employment contract, he was required to provide surgical services as required by the hospital. *Chamley*, ¶ 10, 730 N.W.2d at 867.

23. Brief of Appellant, *supra* note 9, at 4-6 (implying from Dr. Khokha's "Physician Employment Agreement" that he was indirectly compensated for the services he performed). Dr. Khokha gave the hospital the right to bill for his services in exchange for a salary. *Id*.

24. *Id*. at 5-6. *See* MORRIS, *supra* note 6, at 775 (stating that the inferior *vena cava* connects "[a]ll of the veins of the abdomen, pelvis, and lower extremities, with few exceptions of the superior epigastric and ascending lumbar veins"). Since Ms. Chamley's surgery was on her kidney, the inferior *vena cava* was likely the *vena cava* referenced within the case. *See id*. at 775, 777; *Chamley*, ¶ 2, 730 N.W.2d at 866 (explaining Ms. Chamley's *vena cava* was torn, but not clarifying what portion of the *vena cava*).

25. Brief of Appellant, *supra* note 9, at 6.

26. *See Chamley*, ¶ 2, 730 N.W.2d at 865-66 (stating there was already excessive internal bleeding and the tear of the *vena cava* would have caused further internal bleeding).

27. *See id*. at 866 (stating that Dr. Khokha had to repair the *vena cava* and that the repair stopped the internal bleeding).

28. Brief of Appellee Mercy Medical Center, *supra* note 4, at 5; *see also* Brief of Appellee Khokha, *supra* note 1, at 9 (delineating the post-operative steps taken in caring for Ms. Chamley including being transferred into intensive care).

29. Brief of Appellee Khokha, *supra* note 1, at 8-9; *see also* Brief of Appellee Mercy Medical Center, *supra* note 4, at 5 (identifying the hospitals where Ms. Chamley was treated).

30. Brief of Appellee Khokha, *supra* note 1, at 9.

31. Brief of Appellant, *supra* note 9, at 6. The Brief of Appellant does not say what was done surgically for Ms. Chamley while she was in Bismarck. *Id*. No source specifically identifies the cause of Ms. Chamley's death. *See Chamley*, ¶ 2, 730 N.W.2d at 865-66 (suggesting no cause of death); *see also* Brief of Appellee Mercy Medical Center, *supra* note 4, at 5 (implying continued internal bleeding was the cause of death); Brief of Appellee Khokha, *supra* note 1, at 8-9 (insinuating that the cause of Ms. Chamley's death was her care in Bismarck).

32. Brief of Appellee Mercy Medical Center, *supra* note 4, at 5.

33. *Id*. at 3-4.

34. *Chamley*, ¶ 3, 730 N.W.2d at 866.

summary judgment motion and granted immunity to Dr. Khokha under the Good Samaritan statute.[35] The trial court dismissed the claims with prejudice.[36] Mr. Chamley then appealed the case to the North Dakota Supreme Court.[37]

The issue on appeal was "whether the district court erred in granting Dr. Khokha's and Mercy Medical Center's motion for summary judgment on the basis of Dr. Khokha's immunity from suit and from liability under the Good Samaritan Law."[38] The court held that when there is an expectation of remuneration, physicians are precluded from Good Samaritan immunity.[39] The court based this decision upon Section 32-03.1-04 of the North Dakota Century Code.[40]

II. LEGAL BACKGROUND

The Good Samaritan Act has roots in Biblical law.[41] During the formation of English law, Biblical law had a strong influence.[42] The United States subsequently incorporated a substantial amount of English law into its legal system, and with it, many concepts from Biblical law.[43] An embodiment of Biblical law can be seen through the states' formations of

35. *Id*.
36. *Id*. ¶ 1, 730 N.W.2d at 865.
37. *Id*.
38. *Id*.
39. *Id*.
40. *Id*. *See* N.D. CENT. CODE § 32-03.1-04 (1996 & Supp. 2007).

> Nothing in this chapter may be construed to deprive any physician or surgeon licensed in this state of the right to collect reasonable fees for any acts of aid, assistance or treatment; or any other person rendering aid or assistance under this chapter, or those whose property is necessarily damaged in the course of such aid or assistance under this chapter, of the right to reimbursement, from the injured or ill person or that person's estate for any expenses or damages which appeared reasonable and necessary to incur under the circumstances. Any person rendering aid or assistance with an expectation of remuneration shall not be covered by the provisions of this chapter.

Id. The court based its decision on the 2005 version of the law because the legislature had not approved the 2007 statute at the time the case was decided. *See Chamley*, 730 N.W.2d at 864 (stating in the case caption that the decision was handed down on May 8, 2007). The wording of the 2005 and 2007 versions of this statute is exactly the same. *See* 2007 N.D. Laws 1142 (changing the wording in Section 32-03.1-02.3 of the Act which is inapplicable in *Chamley*).

41. *See* discussion *infra* Part II.A (identifying the origin of Good Samaritan laws).

42. *See* discussion *infra* Part II.B (explaining that much of English common law is based on Mosaic law).

43. *See* discussion *infra* Part II.C (discussing the incorporation of Biblical law into the American legal system).

Good Samaritan laws.[44] North Dakota followed the trend and adopted the Good Samaritan Act.[45]

A. BIBLICAL LAW

Good Samaritan laws derived their name from a Biblical parable.[46] The Good Samaritan parable reads:

> Then Jesus answered and said: "A certain man went down from Jerusalem to Jericho, and fell among thieves, who stripped him of his clothing, wounded him, and departed, leaving him half dead. Now by chance a certain priest came down that road. And when he saw him, he passed by on the other side. Likewise a Levite, when he arrived at the place, came and looked, and passed by on the other side. But a certain Samaritan, as he journeyed, came where he was. And when he saw him, he had compassion. So he went to him and bandaged his wounds, pouring on oil and wine; and he set him on his own animal, brought him to an inn, and took care of him. On the next day, when he departed, he took out two denarii, gave them to the innkeeper, and said to him, 'Take care of him; and whatever more you spend, when I come again, I will repay you.' 'So which of these three do you think was neighbor to him who fell among the thieves?'" And then he said, "He who showed mercy on him." Then Jesus said to him, "Go and do likewise."[47]

The story was told by Jesus to a lawyer who was seeking clarification on how to gain eternal life.[48] Jesus told the lawyer to love God as well as his neighbor.[49] Jesus told the parable to the lawyer to explain what it meant to love one's "neighbor."[50] In the parable, the priest and the Levite would

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44. *See* discussion *infra* Part II.C (establishing that all of the states have adopted some form of a Good Samaritan law).

45. *See* discussion *infra* Part II.D (stating that North Dakota adopted the Good Samaritan Act).

46. *Luke* 10:30-37 (Holy Bible).

47. *Id*.

48. *Luke* 10:25.

49. *Luke* 10:27.

50. *Luke* 10:29.

have been considered more likely to aid the wounded man.[51] However, the unlikely party, the Samaritan, is the one who rendered assistance.[52]

The Good Samaritan parable is often credited as the first clear delineation of the valued importance of rendering aid to others in an emergency situation.[53] The teachings behind this parable, however, are embedded in Mosaic law and existed before Jesus told this story.[54] Mosaic law is developed in the Pentateuch.[55] The concept of loving one's neighbor as oneself[56] is one of the many principles found in Mosaic law that exemplifies the lesson enunciated within the Good Samaritan parable.[57]

B. ENGLISH LAW

The principles from Mosaic law influenced early English law.[58] The "English" formed through a merger of the Saxons, Angles, and Jutes.[59] By the time the English came together as a people, both the Saxons and the Danes had already developed primitive legal codes that incorporated biblical concepts.[60]

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51. Michael N. Rader, *The "Good Samaritan" in Jewish Law: Lessons for Physicians, Attorneys, & Laypeople*, 22 J. LEGAL MED. 375, 378, 390 (2001). The priest and the Levite are high religious figures. *Id.* at 398. In walking past the injured man, both the priest and the Levite neglected their duties under Mosaic law. *Id.* at 390.

52. *See* Hon. Joan B. Gottschall, *Factfinding As a Spiritual Discipline*, 4 U. ST. THOMAS L.J. 325, 329 (2006) (stating that the injured man was likely Jewish and that Jews and Samaritans looked down on one another and would not be likely to think of each other as neighbors).

53. *See* Rader, *supra* note 51, at 376 (explaining that the obligation to rescue does not come from the Good Samaritan parable, as people often think, but rather stems from concepts in the Hebrew Bible).

54. *See id.* at 376, 381 (citing scripture verses from Mosaic law that exemplify the same underlying principles of the Good Samaritan parable).

55. Elliot Klayman & Seth Klayman, *Punitive Damages: Toward Torah-Based Tort Reform*, 23 CARDOZO L. REV. 221, 224 n.28 (2001). The Pentateuch is considered to be the first five books of the Bible: Genesis, Exodus, Leviticus, Deuteronomy, and Numbers. *Id.*

56. *See Lev.* 19:18 (Holy Bible) ("You shall not take vengeance nor bear any grudge against the children of your people, but you shall love your neighbor as yourself: I *am* the Lord.") (emphasis original).

57. *See* Rader, *supra* note 51, at 376, 381 (identifying scripture verses from Mosaic Law that exemplify the same principles as those behind the Good Samaritan parable).

58. J. Nelson Happy & Samuel Pyeatt Menefee, *Genesis!: Scriptural Citation and the* Lawyer's Bible *Project*, 9 REGENT U. L. REV. 89, 97 (1997).

59. L.B. CURZON, ENGLISH LEGAL HISTORY 4 (2d ed. 1979). The Angles, Saxons, and Jutes were called the Teutonic tribes. *Id.* at 3. Between the seventh and ninth centuries, these three tribes conquered a large area of England and merged into the "English." *Id.* at 4.

60. *See* Happy & Menefee, *supra* note 58, at 97 (stating that the Saxon laws of King Alfred were based on Christian principles). King Alfred's laws came into existence in 871-901 A.D. FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 7 (James F. Colby ed., 1915). Prior to that, the Saxon laws of Ine, which were in existence from 688-726 A.D., had been based upon principles from Christianity. *Id.* The Danes were also Christian and had Christian laws. 1 W.F. FINLASON, REEVES' HISTORY OF THE ENGLISH LAW, FROM THE TIME OF THE ROMANS TO THE END OF THE REIGN OF ELIZABETH 162, 164 n.(a)

English common law was based mainly on Mosaic law.[61] The first codification of English law was conducted by King Alfred in his Doom Book.[62] The Doom Book adopted the Ten Commandments, other portions of the Pentateuch and the basic form of the Golden Rule in order to set the foundation for the early laws of England.[63]

Another religious influence on English law occurred when William the Conqueror invaded and conquered England in 1066 A.D.[64] During his reign over England, he drastically changed to the English legal system by separating the secular and ecclesiastical courts.[65] Despite this separation, "secular" English law continued to be largely influenced by religion through the late seventeenth century.[66]

C. AMERICAN LAW

When the English colonized America, the developing legal systems embraced Biblical law.[67] In 1585, Sir Walter Raleigh founded the first American colony at Roanoke Island.[68] Queen Elizabeth's grant to Sir Walter Raleigh allowed him to enact statutes for Roanoke Island so long as the statutes conformed to the Christian faith followed by the Church of England.[69] Other colonies also based their legal systems on Biblical teachings.[70] The Puritan colonies adopted Mosaic law to combine the "Law

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(1880). The Jutes and the Angles were from Denmark. *See* CURZON, *supra* note 59, at 4 (identifying that the Jutes were from Jutland and that the Angles were from Angeln, an area in southern Denmark); *see also* M. Donald Hancock, *Denmark*, *in* 5 THE WORLD BOOK ENCYCLOPEDIA 137 (2001) (stating that Jutland was a historical name for the peninsula portion of Denmark).

61. Happy & Menefee, *supra* note 58, at 97; *see also* FINLASON, *supra* note 60, at 164-65 (stating that English common law was based upon Mercian Law, West-Saxon Law, and Danish Law).

62. *See* CURZON, *supra* note 59, at 14 (stating that the laws, or "dooms" began to form into legal codes at the time of King Alfred). King Ethelbert, the first of the Christian Kings of the Saxons, who was converted by St. Augustine circa 597, has the earliest recorded dooms circa 600. *Id*. at 6, 14. *But see* MAITLAND & MONTAGUE, *supra* note 60, at 4 (stating that Ethelbert was a Jute from Kent).

63. Happy & Menefee, *supra* note 58, at 97; *see also* Klayman & Klayman, *supra* note 55, at 224 n.28 (defining the Pentateuch).

64. CURZON, *supra* note 59, at 16 (stating that William, Duke of Normandy, was crowned King of England in 1066 after the death of Edward the Confessor).

65. *Id*. at 16-17. Upon his crowning, William I confirmed the English laws. *Id*. A condition for the papal approval of his invasion of England was that he set up a separate ecclesiastical court system. *Id*. at 17.

66. Happy & Menefee, *supra* note 58, at 107.

67. *Id*.

68. Karen Ordahl Kupperman, *Lost Colony*, *in* THE WORLD BOOK ENCYCLOPEDIA 2001, vol. L at 472.

69. Happy & Menefee, *supra* note 58, at 108.

70. *Id*.

of God" with the "Law of Nature."[71] The Bible was used to supplement existing legal codes[72] and was cited as a positive reference both by colonial legislative bodies and the courts.[73]

America opted to only impose a moral obligation, rather than a legal obligation, to render aid in Good Samaritan situations.[74] At common law, a person does not have a duty to render assistance.[75] Once a person administers aid, however, that person must use reasonable care in their efforts.[76] If his or her efforts are not reasonable, liability can be imposed upon the care provider.[77]

While the principles and teachings behind Good Samaritan laws have existed since the establishment of Mosaic law, the first codification of a Good Samaritan law in America did not occur until 1959.[78] California was the first state to enact such a law.[79] The California Legislature wanted the statute to shield Good Samaritans from tort liability.[80] Subsequently, all fifty states and the District of Columbia have enacted some form of Good Samaritan law.[81] The majority of states have vague provisions which do not identify where the emergency situation takes place; however, a minority of states either explicitly include or exclude hospital settings.[82] An even

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71. *Id*.

72. *Id*. For example, colonial Connecticut used biblical teachings to fill in the gaps in its legal code. *Id*. at 113-15.

73. *See*, *e.g*., *id*. at 111-18 (stating that Massachusetts cited the Bible in its legal code and the Bible was positively cited in the courts of North Carolina and in the Bay colony).

74. Rader, *supra* note 51, at 386.

75. McDowell v. Gillie, 2001 ND 91, ¶ 6, 626 N.W.2d 666, 669.

76. *Id*.

77. *Id*.

78. Stewart R. Reuter, *Physicians as Good Samaritans: Should They Receive Immunity for Their Negligence When Responding to Hospital Emergencies?*, 20 J. LEGAL MED. 157, 157 (1999).

79. *Id*.

80. STEVEN E. PEGALIS, 2 AM. LAW MED. MALP. § 7:13 (3d ed. 2005).

81. *Id*.

82. Chamley v. Khokha, 2007 ND 69, ¶ 29, 730 N.W.2d 864, 871 (quoting Velazquez v. Jiminez, 798 A.2d 51, 57-59 (2002)). Twenty-nine jurisdictions have general language statutes: North Dakota, New Jersey, Arizona, Georgia, Delaware, Virginia, Alabama, Pennsylvania, Oklahoma, Connecticut, Illinois, Iowa, Nevada, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming. *Velazquez*, 798 A.2d at 59. Eleven jurisdictions exclude immunity from hospital settings: the District of Columbia, New York, Florida, Indiana, Kentucky, Maine, Minnesota, Ohio, Oregon, Rhode Island, and Wisconsin. *Id*. at 58. Seven jurisdictions have statutes that include in-hospital settings: Alaska, California, Colorado, Louisiana, Michigan, Texas, and Idaho. *Id*. at 58-59. There are also four jurisdictions which do not provide any form of immunity: Arkansas, Hawaii, Kansas, and Missouri. *Id*. at 59.

smaller minority have imposed an affirmative obligation on people to render assistance in the event of an emergency.[83]

D. NORTH DAKOTA LAW

North Dakota followed the national trend and enacted a Good Samaritan law.[84] The Good Samaritan law expanded from one statute to an entire Act.[85] While the Act broadened the class of people who were protected by Good Samaritan laws, the definitions of who would be immune remained vague.[86] Very little precedent existed to aid in the interpretations under the Act.[87]

1. *Enactment of the Law*

North Dakota enacted its Good Samaritan law in 1971.[88] The Good Samaritan law was vague and was originally codified as part of the Motor Vehicle Code and related to rendering assistance at a roadside accident.[89] The statute on roadside emergency care was subsequently amended regarding eligibility for immunity.[90] Specific Good Samaritan laws were also in the North Dakota Century Code, but they were scattered within the statutes particularly related to the party seeking immunity.[91] In order to clarify the scattered Good Samaritan provisions, the legislature codified the Good Samaritan Act in 1987.[92]

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83. *See* Rader, *supra* note 51, at 396 (stating that Minnesota, Wisconsin, Vermont, and Rhode Island require bystanders to affirmatively take action beyond calling the authorities).

84. *See* discussion *infra* Part II.D.1 (explaining the enactment of North Dakota's initial Good Samaritan law).

85. *See* discussion *infra* Part II.D.1 (discussing why the Good Samaritan law expanded from one statute to an entire Act).

86. *See* discussion *infra* Part II.D.2 (interpreting the Act as vague because there was no clear manner to establish who would be considered a Good Samaritan).

87. *See* discussion *infra* Part II.D.2 (citing to only one case that had previously interpreted the Act).

88. H.B. 1291, 1971 Leg., 42d Sess. (N.D. 1971).

89. *Id*. A roadside accident is a typical Good Samaritan setting. *See* Chamley v. Khokha, 2007 N.D. 69, ¶ 35, 730 N.W.2d 864, 873 (discussing how the Good Samaritan law originally only applied to motor vehicle situations).

90. *See* H.B. 1291, 1971 Leg., 42d Sess. (N.D. 1971) (excluding physicians from immunity, under Section 39-08-04.1, when rendering care at a roadside accident pursuant to Sections 43-17-37 and 43-17-38 of the North Dakota Century Code); H.B. 1524, 1981 Leg., 47th Sess. (N.D. 1981) (eliminating the exclusion regarding physicians).

91. *Chamley*, ¶ 31, 730 N.W.2d at 871-72 (citing McDowell v. Gillie, 2001 ND 91, ¶ 6, 626 N.W.2d 666, 669).

92. H.B. 1631, 1987 Leg., 50th Sess. (N.D. 1987).

The Good Samaritan Act (Act) was proposed by the Trestle Valley Ski Patrol (Ski Patrol) of Minot, North Dakota.[93] The Ski Patrol identified many Good Samaritans who were not eligible to receive protection.[94] The Ski Patrol's intent in proposing the Act was to broaden the class of individuals who could be granted immunity.[95] The Act passed and was codified.[96]

The Act includes both general provisions regarding when the immunity should apply and a specific provision relating to the actions of physicians.[97] The general rule grants immunity to people who render aid in emergency situations.[98] Under the provision specific to physicians, the North Dakota Century Code states that physicians cannot have an "expectation of remuneration" before the fact; however, physicians are not precluded from receiving compensation afterward.[99] Exceptions under the Act also prevent

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93. *See Chamley*, ¶ 33, 730 N.W.2d at 872 (discussing House Bill 1631). House Bill 1631 was introduced by Representative Janet Wentz on behalf of the Trestle Valley Ski Patrol of Minot, North Dakota. *Id*. The organization provided first aid to injured skiers and wanted protection from liability. *Id*.; *see also* Letter from Don Negaard, Attorney, Pringle & Herigstad, P.C., to Honorable Janet Wentz, N.D. House of Representatives (Jan. 21, 1987) (on file with the North Dakota School of Law Library) [hereinafter Letter from Negaard] (requesting the introduction of a proposed Good Samaritan statute).

94. Letter from Negaard, *supra* note 93. Good Samaritans who were not covered by the Good Samaritan law included: someone who assisted a choking victim in a restaurant, someone who gave CPR to a heart attack victim, or a cab driver who helped an expectant mother. *Id*.

95. *Id*. The Act was only intended to apply to people who were off duty and members of the public. *Chamley*, ¶ 33, 730 N.W.2d at 872 (citing *Hearing on H B. 1631 Before the Senate Judiciary Comm*., 1987 Leg., 50th Sess. (N.D. 1987) (testimony of Representative Janet Wentz)).

96. *See* 1987 N.D. Laws 986 (enacting House Bill 1631 as chapter 32-03.1 of the North Dakota Century Code).

97. N.D. CENT. CODE §§ 32-03.1-01 to -08 (1996 & Supp. 2007). Three specific statutes of North Dakota's Good Samaritan Act were at issue in *Chamley*: § 32-03.1-01, § 32-03.1-04, and § 32-03.1-05 (2007). *Chamley*, ¶¶ 6-8, 730 N.W.2d at 866-67.

98. *See* N.D. CENT. CODE § 32-03.1-02 (identifying North Dakota's general Good Samaritan rule). In its entirety section 32-03.1-02 reads:

> No person, or the person's employer, subject to the exceptions in sections 32-03.1-03, 32-03.1-04, and 32-03.1-08, who renders aid or assistance necessary or helpful in the circumstances to other persons who have been injured or are ill as the result of an accident or illness, or any mechanical, external or organic trauma, may be named as a defendant or held liable in any personal injury civil action by any party in this state for acts or omissions arising out of a situation in which emergency aid or assistance is rendered, unless it is plainly alleged in the complaint and later proven that such person's acts or omissions constituted intentional misconduct or gross negligence.

Id.

99. *Id*. § 32-03.1-04. The "expectation of remuneration" is found in the last sentence of this section. *Id*. It prevents physicians or surgeons from being granted immunity under the Good Samaritan Act. *Id*. The court in *Chamley* defines the terms "expectation" and "remuneration" according to their dictionary meanings because the terms are not defined within the Act. *Chamley*, ¶ 12, 730 N.W.2d at 868; *see also* N.D. CENT. CODE §§ 32-03.1-01 to -08 (failing to provide a definition for these terms). To "expect" is to "anticipate the coming or receipt of." *Chamley*, ¶ 12, 730 N.W.2d at 868 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 799 (3d ed. 1993)). The majority did not define remuneration, but Justice Maring did in her concurrence. *Id*. ¶ 26, 730 N.W.2d at 870 (Maring, J., concurring). "Remunerate" is defined as

anyone who is "employed expressly or actually for the purpose of providing emergency medical aid to humans" from claiming immunity.[100]

2. *Interpretation of the Act*

Prior to *Chamley v. Khokha*,[101] *McDowell v. Gillie*[102] was the only case in which the North Dakota Supreme Court interpreted the Good Samaritan Act.[103] In *McDowell*, a roadside accident took place in blizzard conditions.[104] McDowell had stopped to check on the occupants of a vehicle that had jackknifed into the ditch.[105] While McDowell was stopped, his vehicle was struck from behind by a second vehicle.[106] Gillie, driving a third vehicle, stopped to check on the accident with this second vehicle and caused a second accident with the McDowell vehicle.[107]

McDowell brought an action against Gillie to recover for damages resulting from personal injuries.[108] The issue in *McDowell* was whether the Act protected Gillie from liability for injuries caused during the second accident with the McDowell vehicle.[109] The trial court granted immunity on a summary judgment motion.[110] The North Dakota Supreme Court

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"anticipation of pay or salary for service." *Id.* (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 439 (11th ed. 2005) and BLACK'S LAW DICTIONARY 1296 (6th ed. 1990)).

100. N.D. CENT. CODE § 32-03.1-05 states:

> This chapter shall not encompass any person who, at the time of the emergency, was employed expressly or actually for the purpose of providing emergency medical aid to humans, either within or outside of a hospital or other place or vehicle with medical equipment, for emergency medical aid or other assistance rendered in the regular course of their employment. Such persons and their employers shall be liable for their acts and omissions in rendering emergency medical aid in the regular course of their employment, according to the prevailing law in this state.

Id. The definition of "'[e]mployed expressly or actually' means either that the person's formal duties include the provision of emergency medical aid, or that the person customarily provides such aid and is informally expected or relied upon to do so in the course of their employment." *Id.* § 32-03.1-01(3).

101. 2007 ND 69, 730 N.W.2d 864.

102. 2001 ND 91, 626 N.W.2d 666.

103. *McDowell*, ¶ 8, 626 N.W.2d at 670; *see also* N.D. CENT. CODE §§ 32-03.1-01 to -08 (referencing *McDowell* as the only case law citing to the statutes within the Act).

104. *McDowell*, ¶ 2, 626 N.W.2d at 668. The roadside emergency is thought of as the typical Good Samaritan setting, which is why Good Samaritan immunity was originally only codified as part of Section 39-08-04.1, pertaining to motor vehicles. *See* H.B. 1291, 1971 Leg., 42d Sess. (N.D. 1971) (providing immunity to those who render emergency assistance after a motor vehicle accident has occurred).

105. *McDowell*, ¶ 2, 626 N.W.2d at 668.

106. *Id.* The McDowell vehicle was hit on the passenger side by a second driver named Bryan Martens. *Id.*

107. *Id.* ¶ 3, 626 N.W.2d at 668-69.

108. *Id.* ¶ 4. 626 N.W.2d at 669.

109. *Id.*

110. *Id.*

reversed and remanded the trial court holding that more than one conclusion could be drawn from the evidence.[111] The court found that summary judgment was therefore inappropriate in *McDowell*.[112]

Under the terms of the Act, the court determined that one, or both, of two factors needed to be proven: "(1) that Gillie rendered actions which he reasonably believed he could successfully undertake; or (2) that Gillie rendered actions which he reasonably believed would benefit an injured or ill person and he reasonably believed . . . he could successfully undertake."[113] These requirements combine the reasonable person standard and the subjective state of mind of the person providing assistance.[114] The court identified that no direct evidence was given on Gillie's intentions or state of mind.[115] The court further noted that the presence of these factors was not an appropriate issue for a summary judgment determination.[116]

While North Dakota has codified the Act, *McDowell* did not provide a clear understanding of how the Act would be interpreted.[117] The Act itself does not supply enough information to clearly identify when someone will be considered a Good Samaritan.[118] *Chamley* brings North Dakota closer to achieving clarity under the Act.[119]

III. ANALYSIS

The majority held that the Good Samaritan Act did not grant immunity to Dr. Khokha because he had an expectation of remuneration.[120] Justice

111. *Id.* ¶ 25, 626 N.W.2d at 675.

112. *Id.*; *see also* N.D. R. CIV. P. 56(c) (stating that summary judgment is inappropriate when genuine issues of material fact are present).

113. *McDowell*, ¶ 21, 626 N.W.2d at 674. These two factors are not referenced within the Act itself, nor have they ever been. *See* N.D. CENT. CODE §§ 32-03.1-01 to -08 (1996 & Supp. 2007) (noting other factors that affect immunity, but not these); *see also* 1987 N.D. Laws 986 (forming the original wording of the Act, which also does not include these factors).

114. *McDowell*, ¶ 21, 626 N.W.2d at 674. The "reasonable person" is "[a] hypothetical person used as a legal standard, esp. to determine whether someone acted with negligence; specif., a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests." BLACK'S LAW DICTIONARY 1294 (8th ed. 2004).

115. *McDowell*, ¶ 23, 626 N.W.2d at 674.

116. *Id.* ¶ 21.

117. *See* Chamley v. Khokha, 2007 ND 69, ¶ 15, 730 N.W.2d 864, 869 (looking to Texas case law because no precedent existed to aid in interpreting the Act's application); *see also McDowell*, ¶ 21, 626 N.W.2d at 674 (providing no clearly delineated meaning of what is needed to be a Good Samaritan, only steps that are needed to establish immunity); 1987 N.D. Laws 986 (ratifying Section 32-03.1-02).

118. *See* N.D. CENT. CODE §§ 32-03.1-01 to -08 (identifying people who could have immunity, but not clearly defining who is a Good Samaritan).

119. *See id.* (referencing *McDowell* as the only case that cites the Act).

120. *Chamley*, ¶ 1, 730 N.W.2d at 865.

Maring concurred, identified conflict within the Act, and urged the legislature to clarify the meaning of an "expectation of remuneration."[121] Justice Crothers dissented in part because he did not agree that a physician should be stripped of immunity under the Act during all in-hospital emergency settings.[122] Justice Crothers stated this would contravene the public policy behind the Act.[123]

A. MAJORITY OPINION

The North Dakota Supreme Court determined the trial court erred in granting Dr. Khokha's motion for summary judgment.[124] The court used statutory interpretation principles to identify the meaning and application of the Act.[125] The court held that Dr. Khokha and Mercy Medical Center were not entitled to immunity under the Good Samaritan Act.[126]

1. *Issue*

The issue decided on appeal was "whether the district court erred in granting Dr. Khokha's and Mercy Medical Center's motion for summary judgment on the basis of Dr. Khokha's immunity from suit and from liability under the Good Samaritan law."[127] The court found that the district court erred in making its decision, and reversed and remanded the case.[128] The court held that Dr. Khokha was precluded from immunity as a matter of law because he had an "expectation of remuneration."[129]

2. *Motion for Summary Judgment*

Mr. Chamley appealed from the trial court's granting of summary judgment in favor of Dr. Khokha and Mercy Medical Center.[130] The majority found as a matter of law that Dr. Khokha had an "expectation of

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121. *Id.* ¶¶ 38-39, 730 N.W.2d at 874 (Maring, J., concurring).

122. *Id.* ¶ 42 (Crothers, J., concurring in part, dissenting in part).

123. *Id.* ¶ 54, 730 N.W.2d at 876.

124. *Id.* ¶ 1, 730 N.W.2d at 865 (majority opinion). The opinion was written by District Judge Marquart, who was sitting by assignment for Justice Kapsner, who was disqualified. *Id.* ¶ 21, 730 N.W.2d at 869. Justice Sandstrom concurred with the majority opinion and did not write separately. *Id.* ¶ 20 (Sandstrom, J., concurring).

125. *Id.* ¶ 12, 730 N.W.2d at 868.

126. *Id.* ¶ 19, 730 N.W.2d at 869.

127. *Id.* ¶ 1, 730 N.W.2d at 865.

128. *Id.*

129. *Id.*

130. *Id.* Rule 56 of the North Dakota Rules of Civil Procedure governs motions for summary judgment. N.D. R. CIV. P. 56. The Rule states that the party resisting the motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial." N.D. R. CIV. P. 56(e).

remuneration" because the hospital billed the Chamleys for his services,[131] and paid Dr. Khokha his salary.[132] Dr. Khokha argued that he was not thinking about getting paid, but rather about saving Rosie Chamley's life.[133] The court found this argument could not be used by Mr. Chamley as an inference to preclude summary judgment.[134]

The court cited *BTA Oil Producers v. MDU Resources Group, Inc.*,[135] to establish that mere speculation is insufficient to resist a motion for summary judgment.[136] The court identified that Dr. Khokha's testimony did not specifically state that he was expecting *not* to be compensated.[137] The inferences drawn by the court from Dr. Khokha's statements regarding his thoughts at the time of the emergency were insufficient to defeat a motion for summary judgment.[138] These inferences constituted "mere speculation."[139] "Genuine issues of material fact" are needed rather than "mere speculation" in order to resist a motion for summary judgment.[140]

3. *Statutory Interpretation*

In order to determine the application of Good Samaritan immunity to Dr. Khokha's situation, the majority read three provisions of the Act collectively.[141] The general provision provides immunity subject to the exception for physicians.[142] This exception prevents physicians from being granted immunity when they have an "expectation of remuneration."[143]

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131. *See Chamley*, ¶ 1, 730 N.W.2d at 865 (noting that Dr. Khokha had an expectation of remuneration).

132. *See id.* ¶ 10, 730 N.W.2d at 867-68 (stating that Dr. Khokha was a salaried employee who "assigned to the hospital all rights to bill and collect fees from patients"); *see also* Brief of Appellant, *supra* note 9, at 6 (confirming that Mercy Medical Center billed and was paid for all services).

133. *Chamley*, ¶ 17, 730 N.W.2d at 869.

134. *Id.* ¶ 14, 730 N.W.2d at 868.

135. 2002 ND 55, 642 N.W.2d 873.

136. *Chamley*, ¶ 17, 730 N.W.2d at 869 (citing *BTA Oil Producers*, ¶ 49, 642 N.W.2d at 887).

137. *Id.* ¶ 16, 730 N.W.2d at 868-69.

138. *Id.* ¶ 17, 730 N.W.2d at 869.

139. *Id.* (citing *BTA Oil Producers*, ¶ 49, 642 N.W.2d at 887).

140. *Id.*; *see also* N.D. R. CIV. P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial.").

141. *Chamley*, ¶¶ 6-8, 730 N.W.2d at 866-67 (citing N.D. CENT. CODE §§ 32-03.1-02, 32-03.1-04, 32-03.1-05 (1996 & Supp. 2007)).

142. *Id.* ¶ 6, 730 N.W.2d at 866 (citing N.D. CENT. CODE § 32-03.1-02).

143. *Id.* ¶ 7, 730 N.W.2d at 867 (citing N.D. CENT. CODE § 32-03.1-04); *see also* Danny R. Veilleux, Annotation, *Construction and Application of "Good Samaritan" Statutes*, 68 A.L.R. 4th 294, 301 (1989) (stating that some statutes provide immunity only for persons who give emergency care without expecting payment).

The Act also prevents immunity from being granted to people employed for the purpose of providing emergency medical care.[144] While it is not discussed by the court, a fourth statute becomes necessary to interpret the application of immunity.[145] Section 32-03.1-01 defines the meaning of "employment."[146] It provides that employment for the purposes of emergency care need not be clearly delineated, but rather may be care that is "customarily provided" or "informally expected."[147] The court placed the heaviest consideration on Section 32-03.1-04 when it determined whether Dr. Khokha was entitled to immunity.[148]

The court also consulted precedent on statutory interpretation to determine the meaning of Section 32-03.1-04.[149] The statutory interpretation of the trial court was reviewable upon appeal.[150] The court reversed the trial court's opinion finding that the trial court erred in its interpretation.[151] The court held that Dr. Khokha's expectation of remuneration, under Section 32-03.1-04, precluded him from being granted immunity.[152]

The majority established that the provisions of Section 32-03.1-04, which state that a physician can collect damages that appear reasonable and that a person with an expectation of remuneration could not be granted immunity, are not in conflict.[153] When conflict exists within the statutory scheme, the court must attempt to harmonize the conflicting portions.[154] Since all of the terms within the applicable provisions of the Act are not

144. *Chamley*, ¶ 8, 730 N.W.2d at 867 (citing N.D. CENT. CODE § 32-03.1-05).

145. *See* N.D. CENT. CODE § 32-03.1-01 (defining terms found within the Good Samaritan Act).

146. *Id.* § 32-03.1-01(3) (defining employment as being "employed expressly or actually"). Dr. Khokha's status as an employee of the hospital was a factor in the court's finding that he had an expectation of remuneration. *Chamley*, ¶ 18, 730 N.W.2d at 869. Because Dr. Khokha was an employee, it was important to establish what was expected of him under the Act. *See id.* (identifying whether Dr. Khokha is prohibited from receiving immunity under the Act because of his employment status).

147. N.D. CENT. CODE § 32-03.1-01(3).

148. *Chamley*, ¶ 1, 730 N.W.2d at 865 (identifying that the determination of Dr. Khokha's immunity was based on Section 32-03.1-04).

149. *Id.* ¶ 12, 730 N.W.2d at 868.

150. *Id.* (citing Ballensky v. Flattum-Reimers, 2006 ND 127, ¶ 22, 716 N.W.2d 110, 118).

151. *See id.* ¶ 19, 730 N.W.2d at 869 (stating that the trial court erred in granting summary judgment on the issue of Dr. Khokha's expectation of remuneration).

152. *Id.* ¶ 1, 730 N.W.2d at 865.

153. *Id.* ¶ 13, 730 N.W.2d at 868 (clarifying that "expectation" and "appeared" are the two terms in Section 32-03.1-04 that are debatably conflicting, but the court stated that a person may have no expectation of remuneration when he or she performs the service, but may later bill a reasonable fee and still be permitted immunity). Justice Crothers noted in his dissent in part that there is tension between these provisions of Section 32-03.1-04. *Id.* ¶ 46, 730 N.W.2d at 875 (Crothers, J., dissenting); *see also id.* ¶ 13, 730 N.W.2d at 868 (recognizing Justice Crothers' dissent on this point within the majority opinion).

154. *Id.* (citing Frey v. City of Jamestown, 548 N.W.2d 784, 788 (N.D. 1996)).

defined,[155] the court used the common meanings of the words to interpret their meanings within the statutes.[156] The court determined that these clauses are not ambiguous because the verbs utilize different tenses which allow for harmonization.[157] It is through the clarification of this section and its reading with the other applicable sections of the Act that the court arrived at its conclusion that Dr. Khokha should not be entitled to the immunity available under the Act.[158]

4. *Expectation of Remuneration*

The majority did not discuss how each of the statutes influenced its decision.[159] Instead the court focused its explanation on Dr. Khokha's expectation of remuneration.[160] The majority stated that a salaried physician has an expectation of compensation for the services rendered during the course of his employment.[161] For a salaried employee of a hospital, no emergency situation can arise in his or her employer hospital that would allow for immunity under the Act.[162] The court suggested that both the contract and the expectation of payment for a service are needed to prevent a grant of immunity under the Act.[163] The court recognized that there may be instances where emergencies occur and one of these factors is not met.[164] In those situations, the court suggested that it would still be possible for immunity to be granted.[165]

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155. *See* N.D. CENT. CODE § 32-03.1-01 (1996 & Supp. 2007) (defining some terms, but not the "expectation of remuneration").

156. *Chamley*, ¶ 12, 730 N.W.2d at 868 (citing State v. Ulmer, 1999 ND 245, ¶ 6, 603 N.W.2d 865, 866-67). *Ulmer* suggests that words must be interpreted according to their "plain, ordinary, and commonly understood sense." *Ulmer*, ¶ 6, 603 N.W.2d at 866-67. Dictionary definitions are used to define the commonly understood meanings of the words. *See Chamley*, ¶ 12, 730 N.W.2d at 868 (using Webster's dictionary to find the ordinary meaning of words).

157. *Chamley*, ¶ 13, 730 N.W.2d at 868.

158. *See id.* ¶¶ 6-8, 730 N.W.2d at 866-67 (laying out the applicable provisions of the Act for the case).

159. *See id.* ¶¶ 1-19, 730 N.W.2d at 865-69 (focusing discussion on Section 32-03.1-04 of the North Dakota Century Code rather than how each of the applicable statutes played a role in the majority's decision).

160. *Id.*

161. *See id.* ¶ 14, 730 N.W.2d at 868 (stating that Dr. Khokha was a hospital employee who was being remunerated for the services he performed on Ms. Chamley).

162. *Id.* ¶ 18, 730 N.W.2d at 869.

163. *See id.* (stating that two factors prevented immunity: (1) Dr. Khokha's status as a salaried employee; and (2) the performance of the procedure in the hospital where he was employed).

164. *Id.*

165. *Id.*

The court acknowledged the possibility of applying Good Samaritan laws to the actions taken by a physician within an in-hospital setting.[166] It suggested that the physician could be granted immunity if he or she were not an employee of the hospital where the procedure took place.[167] The court also stated that immunity may still apply if the employee physician renders assistance away from the hospital while off duty.[168]

The court cites to a Texas case, *McIntyre v. Ramirez*,[169] as an example of a situation where the Act could continue to allow for immunity.[170] In *McIntyre*, the physician was visiting a patient at a hospital where he was not employed.[171] He aided in an emergency situation at this hospital and did not bill for his services.[172] Dr. McIntyre was granted immunity under the Texas Good Samaritan law. [173] The North Dakota Supreme Court used this case to demonstrate that physicians could be granted immunity during in-hospital emergencies if there was no expectation of remuneration.[174]

Given the circumstances in *Chamley*, the court did not grant Dr. Khokha immunity because he had an expectation of remuneration.[175] The court essentially eliminated the possibility of a Good Samaritan defense to the most common application for a physician: a salaried employee rendering emergency medical assistance within the hospital where he or she is employed.[176] However, the court did not eliminate the possibility of Good Samaritan immunity entirely.[177] In narrower situations, physicians may continue to claim Good Samaritan immunity: when the physician is either

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166. *Id*.

167. *Id*.

168. *Id*.

169. 109 S.W.3d 741 (Tex. 2003).

170. *Chamley*, ¶ 15, 730 N.W.2d at 868 (citing *McIntyre*, 109 S.W.3d at 742).

171. *Id*. (citing *McIntyre*, 109 S.W.3d at 749). The court stated that McIntyre did not work at the hospital where he provided the emergency care to another physician's patient; however, this is not discussed in *McIntyre*. *See McIntyre*, 109 S.W.3d at 749 (stating that McIntyre regularly delivered babies at that particular hospital and received compensation for those services).

172. *Chamley*, ¶ 15, 730 N.W.2d at 868 (citing *McIntyre*, 109 S.W.3d at 749).

172. *Id*.

173. *Id*. Under the Texas Good Samaritan law, in-hospital settings are included as locations where immunity can be granted; however, many subsections of the rule prevent the granting of immunity when the person would ordinarily receive or be entitled to receive a salary, fee, or other remuneration from administering care. TEX. CODE ANN. § 74.151 (2005 & Supp. 2007). The section of the Texas code cited by the court in *McIntyre* is Section 74.001, but that section was renumbered in 2003 and is now found at Section 74.151. *See* TEX. CODE ANN. § 74.151 (stating the proper language for the Texas Good Samaritan law); *see also* 2003 T.X. Laws ch. 204 § 10.01 (renumbering the sections).

174. *Chamley*, ¶ 15, 730 N.W.2d at 868.

175. *Id*. ¶ 1, 730 N.W.2d at 865.

176. *Id*. ¶ 18, 730 N.W.2d at 869.

177. *Id*.

(1) a salaried hospital employee rendering assistance outside of a hospital, or (2) performing an act within the hospital while having the expectation of remuneration.[178] The court determined that the combination of these two factors precluded Dr. Khokha from receiving Good Samaritan immunity.[179]

B. JUSTICE MARING'S CONCURRENCE

To aid in the interpretation of the Act, Justice Maring utilized the principles of statutory construction and the legislative intent behind the enactment to clarify its meaning.[180] By taking these factors into consideration, she determined that physicians were never meant to be covered in in-hospital emergency settings.[181] For this reason, she concluded that immunity should not be granted to those who "ordinarily receive" compensation for services performed within the hospital.[182]

1. *Statutory Principles and Legislative Intent*

In interpreting the Act, Justice Maring consulted principles of statutory interpretation as found in the North Dakota Century Code and North Dakota case law.[183] In interpreting statutes, the intent of the legislature is presumed clear on the face of the statute.[184] The statute is considered ambiguous if there are multiple rational meanings.[185] In order to clarify, the wording of the statute must be considered as a whole and harmonized.[186] Meaning must be given to every part.[187] If there are multiple statutes in an act, the statutory provisions must be reconciled.[188] The whole must then be

178. *Id*. The court states that if a physician is not employed by the hospital and is called to assist, or if the salaried physician aids in an emergency outside of the hospital, these physicians would still be entitled to claim immunity. *Id*.

179. *Id*.

180. *See id*. ¶¶ 24, 33-37, 730 N.W.2d at 869-70, 872-74 (Maring, J., concurring) (citing to chapter 1-02 of the North Dakota Century Code and legislative session bills to clarify the meaning of the Act).

181. *Id*. ¶ 39, 730 N.W.2d at 874.

182. *Id*. ¶ 22, 730 N.W.2d at 869.

183. *See id*. ¶ 24, 730 N.W.2d at 869-70 (citing N.D. CENT. CODE § 1-02 (2005); Meljie v. N.D. Workers Comp. Bureau, 2002 ND 174, ¶ 15, 653 N.W.2d 62, 67; Doyle *ex rel*. Doyle v. Sprynczynatyk, 2001 ND 8, ¶ 10, 621 N.W.2d 353, 356) (providing guidelines for statutory interpretation).

184. *Id*. (citing N.D. CENT. CODE § 1-02-05).

185. *Id*. at 870 (citing Shiek v. N.D. Workers Comp. Bureau, 2002 ND 85, ¶ 12, 643 N.W.2d 721, 725).

186. *Id*. (citing N.D. CENT. CODE §§ 1-02-07, 1-02-38(2); *Meljie*, ¶ 15, 653 N.W.2d at 67; *Doyle*, ¶ 10, 621 N.W.2d at 356).

187. *Id*.

188. *Id*. (citing Grey Bear v. N.D. Dep't of Human Servs., 2002 ND 139, ¶ 7, 651 N.W.2d 611, 614). Contextual consideration must be given to statutes found within an act and the purposes for the enactment of the statutes must be considered. *Id*.

examined with a view of arriving at the true intention of every part.[189] To aid in the interpretation, legislative history and other outside resources may be used.[190] However, it must be remembered that the intent of the legislature would not be something absurd, ludicrous, or unjust.[191] Justice Maring used these principles to determine the meaning of Section 32-03.1-04 when it was read together with the rest of the Act, particularly with Section 32-03.1-02.1.[192]

2. *Justice Maring's Analysis*

Justice Maring concurred in the result of the case, because it was undisputed that Dr. Khokha was remunerated for his services.[193] She placed special emphasis on the intent behind the statutes in the Act.[194] She also highlighted the differences in the statutory construction of Good Samaritan laws across the country.[195]

Under common law, a bystander has no obligation to render assistance in an emergency situation.[196] However, in order to encourage aid from strangers, all fifty states and the District of Columbia have enacted some

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189. *Id.* (citing N.D. CENT. CODE §§ 1-02-07, 1-02-38(2); *Meljie*, ¶15, 653 N.W.2d at 67; *Doyle*, ¶ 10, 621 N.W.2d at 356).

190. *Id.* at 869-70 (citing N.D. CENT. CODE § 1-02-39).

191. *Id.* at 870 (citing N.D. CENT. CODE § 1-02-38(3), (4); McDowell v. Gillie, 2001 ND 91, ¶ 11, 626 N.W.2d 666, 671).

192. *Chamley*, ¶¶ 24-27, 730 N.W.2d at 869-71 (implying from Justice Maring's concurrence that she used these principles to aid in determining the meaning of Section 32-03.1-04; however, she does not specifically discuss how each of these principles aided in her interpretation of section 32-03.1-04); *see also* N.D. CENT. CODE § 32-03.1-02.1 (posing a conflict with Section 32-03.1-04 according to Justice Maring):

> A physician licensed under chapter 43-17 who renders emergency obstetrical care or assistance to a pregnant female in active labor who has not previously been cared for in connection with the pregnancy by the physician or by another person professionally associated with the physician and whose medical records are not reasonably available to the physician is not liable in any personal injury civil action for acts or omissions resulting from the rendering of that emergency care or assistance, unless it is plainly alleged in the complaint and later proven that the physician's acts or omissions constituted intentional misconduct or gross negligence. The immunity from civil liability provided by this section does not extend to a physician who renders emergency obstetrical care or assistance with an expectation of remuneration or who collects a fee for rendering that care or assistance.

Id.

193. *Chamley*, ¶ 22, 730 N.W.2d at 869.

194. *See id.* ¶¶ 32-38, 730 N.W.2d at 872-74 (looking to the legislative testimony behind Sections 32-03.1-04 and 32-03.1-02.1 of the North Dakota Century Code to aid in the interpretation of the Act).

195. *Id.* ¶ 29, 730 N.W.2d at 871 (citing Velazquez v. Jiminez, 798 A.2d 51, 57 (N.J. 2002)).

196. *Id.* ¶ 28 (citing *McDowell*, ¶ 6, 626 N.W.2d at 670). When a bystander begins to render aid, he must use reasonable care or he can be liable for the resulting injuries. *Id.* (citing *McDowell*, ¶ 6, 626 N.W.2d at 670; *Velazquez*, 798 A.2d at 56).

form of a Good Samaritan law which provides immunity in certain emergency situations.[197] There are three common constructions for Good Samaritan statutes:[198] (1) specifically including hospital settings, (2) specifically excluding hospital settings, and (3) those that are ambiguous as to hospital settings.[199] North Dakota's Good Samaritan law is an ambiguous provision.[200]

3. *Legislative History and Intent*

In her analysis, Justice Maring discussed the legislative intent and history behind the ratification of the Act.[201] House Bill 1631 enacted the Good Samaritan Act which is now found in chapter 32-03.1 of the North Dakota Century Code.[202] In the hearings on the bill, the intent of the original Good Samaritan law was focused on emergency situations arising from roadside accidents.[203] The bill expanded the class of individuals who could be granted immunity.[204] Non-roadside emergencies also presented potential situations where Good Samaritan immunity could be applied.[205] No legislative history contemplated the application of the Good Samaritan law in hospital settings.[206] Because of this, Justice Maring concluded that the legislative intent behind House Bill 1631 did not extend immunity to cover in-hospital emergencies.[207]

Justice Maring concluded that the majority's reading of Section 32-03.1-04 of the North Dakota Century Code frustrated the legislative intent

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197. *Id.* ¶ 29 (citing *Velazquez*, 798 A.2d at 57).

198. *Id.* (citing *Velazquez*, 798 A.2d at 58).

199. *Id.* (citing *Velazquez*, 798 A.2d at 58-59).

200. *Id.* ¶ 30; *see also* N.D. CENT. CODE § 32-03.1-02 (1996 & Supp. 2005) (stating the general Good Samaritan law).

201. *See Chamley*, ¶¶ 32-38, 730 N.W.2d at 872-74 (discussing testimony on House Bill 1631 and Senate Bill 2422).

202. *Id.* ¶ 35, 730 N.W.2d at 873 (citing *Hearing on H B. 1631 Before the Senate Judiciary Comm.*, 50th Sess. (1987) (testimony of Sen. Maxson and Rep. Janet Wentz)); *see also* N.D. CENT. CODE §§ 32-03.1-01 to -08 (codifying the Good Samaritan Act).

203. *See Chamley*, ¶ 33, 730 N.W.2d at 872 (stating that there were a number of Good Samaritan laws in the North Dakota Century Code, but that the broad law was in the motor vehicle code); *see also* Letter from Negaard, *supra* note 93 (proposing the Good Samaritan statute and submitting it to the Senate Judiciary Committee in support of House Bill 1631).

204. *Chamley*, ¶ 35, 730 N.W.2d at 873.

205. *Id.* ¶ 31, 730 N.W.2d at 871-72 (citing McDowell v. Gillie, 2001 ND 91, ¶ 7, 626 N.W.2d 666, 669). Various statutes throughout the North Dakota Century Code provide immunity: § 23-27-04.1 (emergency medical services operators); § 32-03-40 (firefighters, police officers, and peace officers); § 32-03-42 (licensed health care providers for amateur athletics); § 39-08-04.1 (volunteers at the scene of a disaster or en route to treatment if no expectation of remuneration); § 43-12.1-12 (licensed nurses at an emergency scene); § 43-17-37 (resident physicians treating in an emergency); and § 43-17-38 (nonresident physicians treating in an emergency). *Id.*

206. *Id.* ¶ 36, 730 N.W.2d at 873.

207. *Id.* ¶ 39, 730 N.W.2d at 874.

and rendered Section 32-03.1-02.1 useless.[208] Justice Maring identified conflict and ambiguity between these provisions of the Act.[209] She explained that the legislature enacted Section 32-03.1-02 in 1989, after Section 32-03.1-04.[210] The majority's interpretation rendered Section 32-03.1-02.1 moot, according to Justice Maring.[211] She noted that it was strange for the legislature to allow a surgeon, but not an obstetrician, immunity for his services.[212]

4. *Standard for the Expectation of Remuneration*

Justice Maring urged the legislature to amend the Good Samaritan statute to exclude people who "ordinarily receive remuneration."[213] She suggested that a more objective standard is needed to define when there is an expectation of remuneration.[214] She addressed the Texas Good Samaritan law, as cited by the majority in *McIntyre*, which identified two situations for that expectation.[215] The Texas law establishes that immunity cannot be granted if a person "would ordinarily (1) receive or (2) be entitled to receive payment under the circumstances of the case."[216] If the law is left having a subjective consideration, the physician's thoughts are a factor which would prevent him or her from receiving immunity.[217] No physician would testify against his or her own self-interest.[218] As a result, Justice Maring requested that the legislature amend the Act so it would have an objective standard.[219]

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208. *Id.* ¶ 37.

209. *Id.* ¶ 38.

210. *Id.* ¶¶ 32, 37, 730 N.W.2d at 872-73; *see also* 1989 N.D. Laws 1137 (enacting Section 32-03.1-02); 1987 N.D. Laws 986 (ratifying Section 32-03.1-02).

211. *See Chamley*, ¶ 37, 730 N.W.2d at 873 ("All of these circumstances would have been already covered by the existing Good Samaritan Act if the legislature had intended it to cover emergency assistance rendered in-hospital or in other medical facilities."); *see also id.* at 874 ("Adopting the majority's construction would render N.D.C.C. § 32-03.1-02.1 an idle act.").

212. *See id.* ¶ 38, 730 N.W.2d at 874 (identifying the unfairness of granting immunity to one type of physician providing emergency aid and not the other). Section 32-03.1-02.1 prevents obstetricians from receiving immunity when they provide emergency obstetric care if there was an expectation of remuneration. *Id.*; *see also* N.D. CENT. CODE 32-03-02.1 (1996 & Supp. 2005) (eliminating immunity for obstetricians when he or she has an expectation of receiving compensation for his or her services).

213. *Chamley*, ¶ 39, 730 N.W.2d at 874.

214. *Id.* ¶ 26, 730 N.W.2d at 870.

215. *Id.* (citing McIntyre v. Ramirez, 109 S.W.3d 741, 745 (Tex. 2003)).

216. *Id.*

217. *See id.* (stating that the "expectation of remuneration" is based upon the physician's testimony of his or her personal thoughts).

218. *Id.*

219. *See id.* ¶¶ 26, 39, 730 N.W.2d at 870, 874 (suggesting the current standard is subjective and urging the legislature to make an amendment that would objectify the standard).

Justice Maring also noted that physicians are not volunteers when they are in a hospital setting.[220] They can do more than simply render first aid until the Emergency Medical Services team arrives.[221] The disadvantage of not having prior knowledge of a patient's condition alone should not present the need for Good Samaritan immunity.[222]

In making these illustrations, Justice Maring requested that the legislature amend the Act to clarify its meaning.[223] Her request was for an objective test.[224] This accommodation, however, would effectively change North Dakota's statutory construction from a vague statute to one that excludes hospital settings.[225]

C. JUSTICE CROTHERS' CONCURRENCE IN PART, DISSENT IN PART

1. *Concurrence in Part*

Justice Crothers concurred in the result.[226] The only portion of the majority opinion he concurred with was the reversal of the trial court.[227] He agreed that the case should be remanded because genuine issues of material fact were present, rendering summary judgment inappropriate.[228]

2. *Dissent in Part*

Justice Crothers dissented because he did not agree that a physician in a hospital setting should be excluded from immunity.[229] He disapproved of the methods used by the court for statutory interpretation and its reading of

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220. *Id.* ¶ 39, 730 N.W.2d at 874 (citing Reuter, *supra* note 78, at 189). Physicians are not put at the same disadvantage as someone who renders care at the scene of a roadside accident. *Id.*

221. *Id.*

222. *See id.* ("[T]his disadvantage does not rise to the level of the difficulty that confronts the physician who stops at the site of a roadside accident, who can provide little more than first-aid until the EMS team arrives.").

223. *Id.*

224. *See id.* ¶¶ 26, 39, 730 N.W.2d at 870, 874 (urging the legislature to change the standard). Justice Maring stated that the expectations of the individual physician created a subjective test under North Dakota law which rendered the exception meaningless. *Id.* ¶ 26, 730 N.W.2d at 870.

225. *See id.* ¶¶ 26, 39, 730 N.W.2d at 870, 874 (requesting that immunity be denied to those who would ordinarily receive remuneration); *see also id.* ¶ 26, 730 N.W.2d at 870 (suggesting that the legislature never intended to include in-hospital emergency services performed by a physician).

226. *Id.* ¶ 42, 730 N.W.2d at 874 (Crothers, J., concurring in part, dissenting in part).

227. *Id.* ¶ 60, 730 N.W.2d at 878.

228. *Id.*; *see also* N.D. R. CIV. P. 56(c) (stating that a party is entitled to judgment as a matter of law if there are no genuine issues of material fact).

229. *Chamley*, ¶ 42, 730 N.W.2d at 874.

Section 32-03.1-04.[230] He also opposed the majority's implicit imposition of a duty upon Dr. Khokha.[231]

3. *Statutory Interpretation*

In interpreting the statutes, Justice Crothers stated that the majority ignored the rules of statutory constructions.[232] He noted that the majority improperly added words to the statute.[233] Justice Crothers identified that the legislature is supposed to have meant only what it said.[234] He stressed the importance of reading the text as a whole to harmonize any ambiguous provisions.[235] He noted that any interpretations of the statutory language must be made in accordance with the ordinary meaning of the words, unless they are otherwise defined by statute.[236] In using these rules of statutory interpretation, Justice Crothers found tension within the statute.[237]

Justice Crothers suggested that the majority and Justice Maring avoided the tension in the collective reading of the statutes.[238] The expectation of remuneration was used by the majority and Justice Maring to deny Dr. Khokha immunity.[239] Justice Crothers noted that their interpretations failed to harmonize the "expectation of remuneration" with the first provision found in the statute.[240] This first provision stated: "Nothing in this chapter may be construed to deprive any physician or surgeon licensed in this state of the right to collect reasonable fees."[241] Because there was no reconciliation of this provision in the statute, Justice Crothers found that no ultimate conclusion was reached; therefore, summary judgment would have been inappropriate.[242]

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230. *Id.* ¶ 47, 730 N.W.2d at 875-76.

231. *Id.* ¶ 43, 730 N.W.2d at 874-75. The implicit duty placed upon Dr. Khokha was a duty to treat any patient who entered the hospital. *Id.*

232. *Id.* ¶ 47, 730 N.W.2d at 875-76.

233. *Id.* ¶¶ 43, 47, 730 N.W.2d at 874-75. Justice Crothers thought the majority's interpretation improperly added words to the statute and created a test based on the physical location where the service was performed. *Id.* ¶ 47. Justice Crothers did not identify the specific words he believed the majority was adding. *Id.*

234. *Id.* ¶ 53, 730 N.W.2d at 876 (citing State v. Myers, 19 N.W.2d 17, 29 (N.D. 1945); City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940)).

235. *Id.* ¶ 47, 730 N.W.2d at 875-76.

236. *Id.* ¶ 48, 730 N.W.2d at 876 (citing N.D. CENT. CODE § 1-02-02 (2005)).

237. *See id.* ¶ 51 (implying that tension existed within the statute by identifying how the other justices ignored it).

238. *Id.*

239. *Id.* ¶ 9, 730 N.W.2d at 867; *id.* ¶ 22, 730 N.W.2d at 869 (Maring, J., concurring).

240. *Id.* ¶ 46, 730 N.W.2d at 875 (Crothers, J., concurring in part, dissenting in part).

241. *Id.* (citing section N.D. CENT. CODE § 32-03.1-04).

242. *Id.* ¶ 49, 730 N.W.2d at 876.

4. *Implicit Duty*

Justice Crothers also dissented in part because the majority and Justice Maring implicitly imposed a duty upon Dr. Khokha.[243] However, Justice Crothers identified that Dr. Khokha did not have a duty to treat every patient in the hospital.[244] He also recognized that Dr. Khokha had no prior physician-patient relationship with Ms. Chamley.[245] Dr. Khokha was not on call.[246] He also was not an emergency room physician or a member of a "code blue" team.[247] Dr. Khokha simply volunteered to assist Dr. Shahin.[248] Dr. Khokha also had no relationship or obligation which required him to assist Dr. Shahin.[249] Another surgeon was asked to assist with Ms. Chamley's emergency situation, but he refused.[250] This other physician experienced no consequences as a result of his refusal.[251] The majority's and Justice Maring's opinions did not discuss this other surgeon.[252]

5. *Expectation of Remuneration*

Contrary to the majority and Justice Maring's concurrence, Justice Crothers suggested in his dissent that the "expectation of remuneration" should not have presented an issue.[253] Justice Crothers indicated that Dr. Khokha was a salaried physician; Dr. Khokha would have been paid the

243. *Id.* ¶ 43, 730 N.W.2d at 874-75.

244. *See id.* at 875 ("[I]mplicit in [the majority's] holding is that Dr. Khokha had a duty as a matter of law to treat any and all patients who cross the hospital threshold."). Justice Crothers did not find anything within the terms of Dr. Khokha's employment contract requiring him to render assistance to other physicians in emergency situations. *Id.* ¶ 45.

245. *See id.* ¶ 44 (finding that Dr. Khokha had never diagnosed or treated Ms. Chamley before entering the operating room to assist Dr. Shahin). A physician-patient relationship is a contractual relationship that can be either express or implied. Dorothy M. Allison, *Physician Retaliation: Can the Physician-Patient Relationship Be Protected*, 94 DICK. L. REV. 965, 966-67 (1990). The contractual relationship imposes a duty on the physician to provide the patient with reasonable care of a physician within his or her particular field. *See* Heimer v. Privratsky, 434 N.W.2d 357, 359 (N.D. 1989) (stating the standard of care for physicians and surgeons).

246. *Chamley*, ¶ 45, 730 N.W.2d at 875.

247. *Id.*; *see also supra* note 18 (defining a "code blue" team).

248. *Chamley*, ¶ 44, 730 N.W.2d at 875. Dr. Shahin testified that Dr. Khokha had no obligation to aid him in his surgery on Ms. Chamley. *Id.*

249. *Id.* ¶ 57, 730 N.W.2d at 877-78.

250. *Id.* at 878.

251. *See id.* (stating that another surgeon refused to assist); *see also id.* ¶ 3, 730 N.W.2d at 866 (listing the parties to the suit, not including this other surgeon); Brief of Appellee Khokha, *supra* note 1, at 7 (identifying the unnamed surgeon as Dr. Wayne Anderson).

252. *Chamley*, ¶¶ 1- 41, 730 N.W.2d at 865-74.

253. *See id.* ¶ 50 (Crothers, J., concurring in part, dissenting in part) (disagreeing with the majority on their interpretation of the expectation of remuneration).

same amount whether or not he performed the surgery on Ms. Chamley.[254] Justice Crothers noted that Dr. Khokha had a set salary and was not paid on a per surgery basis.[255] Justice Crothers stated that Dr. Khokha should not be precluded from liability because he was paid for his services.[256] Justice Crothers identified that the physician who decided not to assist Dr. Shahin would have had the same "expectation of remuneration."[257]

6. *Legislative Intent*

Justice Crothers indicated that the legislature was the appropriate body to consider the cohesiveness of the Act.[258] He noted that the conflict within the Act was an issue for the legislature, rather than the judiciary, to rectify.[259] He recognized the discord in the legislative intent behind Sections 32-03.1-04 and 32-03.1-02.1, as discussed by Justice Maring. [260] He further acknowledged a need to resolve the tension found within Section 32-03.1-04.[261]

Justice Crothers identified that the Act was intended to promote action from those who have no pre-existing duty to render care.[262] By excluding hospital settings, Justice Crothers believed the public policy behind the Act would be discouraged.[263] He also noted that some form of incentive should be present for physicians who otherwise would have no duty to help during

254. *See id.* ¶¶ 46, 50, 730 N.W.2d at 875, 76 (stating Dr. Khokha was a salaried employee and that he would have had an expectation of remuneration regardless of his actions).

255. *Id.* ¶ 45, 730 N.W.2d at 875 (stating Dr. Khokha was a salaried physician who had his own patient that he would have seen if he had not assisted with Ms. Chamley). *But see id.* ¶ 10, 730 N.W.2d at 868 (stating that Dr. Khokha was paid on both a salary and incentive basis).

256. *See id.* ¶ 50, 730 N.W.2d at 876 (Crothers, J., concurring in part, dissenting in part) ("Dr. Khokha should [not] be stripped of immunity as a matter of law because he received the same pay for trying to save the life of another physician's patient as he would have, had he done nothing.").

257. *See id.* ¶ 57, 730 N.W.2d at 878 (stating the other surgeon was an employee of the hospital); *see also* Brief of Appellee Mercy Medical Center, *supra* note 4, at 8 (stating Wayne Anderson was a general surgeon in the operating room who chose not to help).

258. *Chamley*, ¶ 59, 730 N.W.2d at 878 (identifying conflicting legislative policy and intent behind the various statutes within the Act but concluding that these considerations were to be left for the legislature to review).

259. *Id.*

260. *Id.*

261. *See id.* ¶ 51, 730 N.W.2d at 876 (implying that there is tension within the Section by recognizing that the majority and Justice Maring avoided it).

262. *Id.* ¶ 54, 730 N.W.2d at 877 (citing McDowell v. Gillie, 2001 ND 91, ¶ 13, 626 N.W.2d 666, 671).

263. *Id.*

an in-hospital emergency.[264] The effects of *Chamley* provide North Dakota law with additional clarity in the interpretation of the Act.[265]

IV. IMPACT

Chamley may affect many aspects of medical malpractice law in North Dakota.[266] To begin, hospitals have a duty to hire competent employees and set clear standards for them.[267] Subsequently, when physicians are making determinations whether to render assistance, they have many factors to take into account.[268] Finally, the legislature can choose to take action and look at the policy considerations behind the application of immunity and when it can be applied.[269] To clarify the interpretation of the Good Samaritan Act, the legislature could amend the Act to clarify its interpretation.[270]

A. DUTIES OF HOSPITALS

Mercy Medical Center did not perform the surgery on Ms. Chamley.[271] Because of this, Mercy Medical Center was not directly liable for the death of Ms. Chamley.[272] The hospital only had the possibility of vicariously liability because it employed Dr. Khokha.[273] The hospital had the responsibility of hiring competent employees to provide patients with reasonable care.[274] The hospital also had to preemptively address situations that may

264. *See id.* ¶ 57, 730 N.W.2d at 878 (stating the legislature meant to provide an incentive to act and that the majority removed the incentive for physicians in these situations).

265. *See* discussion *infra* Part IV.A–D (indicating the impact on North Dakota).

266. *See* discussion *infra* Part IV.A–D (discussing potential effects on North Dakota medical malpractice law).

267. *See* discussion *infra* Part IV.A (recognizing the obligations of a hospital).

268. *See* discussion *infra* Part IV.B (identifying insurance premiums and reputation as major factors to take into account when making the determination of whether to render assistance).

269. *See* discussion *infra* Part IV.C (indicating when the immunity applies and policy considerations regarding the application).

270. *See* discussion *infra* Part IV.D (discussing possible areas where the legislature could amend the Act in order to clarify the meaning and intent of the Act).

271. *See* Chamley v. Khokha, 2007 ND 69, ¶ 2, 730 N.W.2d 864, 865-66 (indicating that Dr. Shahin and Dr. Khokha performed the surgery while they were at Mercy Medical Center).

272. *See* Nelson v. Gillette, 1997 ND 205, ¶ 10, 571 N.W.2d 332, 334 (citing Binstock v. Fort Yates Pub. Sch. Dist., 463 N.W.2d 837, 842 (N.D. 1990)) (stating that employers are vicariously liable for the torts committed while an employee is acting within the scope of his or her employment).

273. *Id.* (citing *Binstock*, 463 N.W.2d at 842) (finding that employers can be liable vicariously for the acts of their employees).

274. *See* 41 C.J.S. *Hospitals* § 35 (2007) (indicating that hospitals have a duty to provide their patients with reasonable hospital services).

result in accidents or emergencies.[275] In addressing these potential problems, the hospital had an obligation to ensure its employees were informed about the hospital's expectations for its employees' actions.[276] To do this, hospitals often turn these expectations into rules and regulations.[277] *Chamley* should push hospitals to clarify their standards and employee contracts to discuss the roles and requirements of employees during in-hospital emergencies.[278]

B. CONSIDERATIONS FOR PHYSICIANS

Justice Crothers suggested that the majority's reading was contrary to the public policy behind the Act.[279] The purpose of the Act is to provide an incentive for parties who have no prior obligation to render aid in an emergency situation.[280] By depriving physicians of the possibility of immunity during in-hospital emergencies, physicians have no incentive to render assistance when they have no prior obligation to a hospital patient.[281]

By helping a coworker in an emergency, similar to Dr. Shahin in *Chamley*, physicians expose themselves to potential liability.[282] This exposure could affect the physician financially due to the costs associated with defending a lawsuit.[283] While malpractice insurance covers the cost of

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275. Reuter, *supra* note 78, at 186. Pressure is put on hospitals to attain compliance with standards and guidelines set by outside organizations which impact the hospital's accreditation. *Id*. The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) is one such organization because it accredits hospitals. Carol R. M. Moss, *You Do Know What You're Doing? Right, Doc? Minnesota Supreme Court Contemplates Negligent Credentialing and Privileging*, 30 HAMLINE L. REV. 125, 140 (2007). An accreditation from JCAHO is necessary for a hospital to be able to participate in the Medicare program. Robert J. Jacoby, *Substandard Care: An Overlooked Risk Area?*, 9 J. HEALTH CARE COMPLIANCE 51, 51 (2007).

276. *See* Reuter, *supra* note 78, at 189 (requiring physicians to adhere to hospital standards in order to retain staff privileges).

277. *See id*. (stating that these regulations are written into the hospital bylaws and into the rules and regulations imposed by the hospital upon its staff).

278. *See* Chamley v. Khokha, 2007 ND 69, ¶ 10, 730 N.W.2d 864, 867-68 (discussing the employment of Dr. Khokha and identifying that he was required to perform surgeries as directed by the hospital); *see also supra* note 19 and accompanying text (identifying the miscommunication in expectations for Dr. Khokha under the terms of his contract).

279. *Chamley*, ¶ 54, 730 N.W.2d at 877 (Crothers, J., concurring in part, dissenting in part).

280. *Id*. (citing McDowell v. Gillie, 2001 ND 91, ¶ 13, 626 N.W.2d 666, 671).

281. *See id*. ¶ 57, 730 N.W.2d at 878 (stating that the legislature likely meant to protect people like Dr. Khokha, who render aid when they have no duty to do so, by giving these people an incentive to act, and that the majority removed the incentive).

282. *See id*. (stating another physician refused to help). This other physician was not sued in connection with this refusal. *See id*. ¶ 3, 730 N.W.2d at 866 (naming the parties to the lawsuit).

283. *See* Cathleen B. Tumulty, *Capping Non-Economic Damages: Is It Really What the Doctor Ordered? Predicting the Effect of Federal Tort Reform by Examining the Impact of Tort Reform at the State Level*, 39 SUFFOLK U. L. REV. 817, 820 (2006) (stating that physicians pay the premiums for their medical malpractice insurance). When an action against a doctor is filed,

defending a suit, the physician will experience increased premiums each time the physician is sued.[284]

Another ramification that physicians should take into consideration when deciding whether to provide assistance is the impact upon his or her reputation.[285] The doctor's coworkers are likely going to be upset with him or her, and workplace hostility may result if a physician declines to help.[286] Also, coworkers may be less likely to help that physician if he or she needed future assistance, particularly in an emergency situation.[287] By refusing to act, the physician may be harming his or her career.[288]

A physician should also consider the effect of declining to render aid on his or her obligations to the hospital.[289] Hospitals often impose obligations and standards on physicians outside of those discussed in employment contracts.[290] Failure to comply with standards could result in sanctions for the physician.[291] By declining to render treatment, the physician may also be violating ethical obligations.[292] This too could expose the physician to the possibility of sanctions by the hospital.[293] In light of *Chamley*, physicians should consider these factors and make a pre-determined decision whether they should render assistance during an in-hospital emergency.[294]

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whether valid or not, the physician's malpractice insurance premiums are increased. *See id.* at 822 (blaming frivolous suits for malpractice insurance premium hikes).

284. *See id.* at 820 (viewing payment of premiums as consideration for paying for the costs of coverage for any claims made against the physician during the period of coverage).

285. *See* Reuter, *supra* note 78, at 187 (suggesting that realistically no physician would decline a request from a colleague in an emergency situation because of the damage it would do to his or her reputation).

286. *Id.*

287. *See id.* (stating that colleagues would scorn the physician that declined to help).

288. *See id.* (implying that a physician would never refuse to help a colleague in an emergency situation because it would ruin his or her career).

289. *See id.* (suggesting that a physician could be punished by the hospital for declining to render assistance).

290. *See id.* at 189 (imposing expectations through rules and regulations on the hospital staff).

291. *See id.* (stating that physicians must agree to conditions outside of employment contracts in order to be given staff privileges). As a result, a violation of these conditions would likely result in sanctions or the revocation of staff privileges. *See id.* (indicating privileges are contingent upon compliance with rules and regulations on the physicians).

292. *See id.* at 187 (suggesting physicians who decline to render assistance in an emergency are violating their Hippocratic Oath); *see also* Allison, *supra* note 245, at 990 (proposing hospitals should sanction physicians who fail to live up to their ethical obligations).

293. *See* Allison, *supra* note 245, at 990 (recommending that sanctions be imposed upon physicians who violate their ethical obligations).

294. *See* Chamley v. Khokha, 2007 ND 69, ¶ 18, 730 N.W.2d 864, 869 (stating that employment at a hospital, in tandem with the performance of a procedure, form an expectation of remuneration precluding the possibility of immunity).

C. APPLICABILITY OF IMMUNITY

A balance needs to be struck between the incentive to provide help and the rights of the patient.[295] In order to have an effective Good Samaritan law that will increase the likelihood of a physician rendering aid in an emergency, there must be an incentive for the physician to act.[296] Other factors may, however, influence a physician to act, which would lessen the need for Good Samaritan protections.[297] Because of this, hospital patients may not be considered among the class of people who need rescuing, which could make Good Samaritan immunity unnecessary for physicians.[298]

Within his dissent in part, Justice Crothers noted that patients who experience in-hospital emergencies are at-risk because physicians will not want to expose themselves to liability by rendering aid when a preexisting obligation does not exist.[299] Justice Crothers theorized that the implicit duty imposed upon Dr. Khokha by the majority should also be imposed on the other physician who chose not to assist Dr. Shahin.[300] *Chamley* presents a slippery slope because every salaried physician within the hospital could be seen as having an obligation to every patient within the hospital.[301] If this were the case, both physicians and hospitals would be exposed to a greater level of liability.[302]

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295. *See* Mark Turner, *Dial 911: Emergency Medical Care Providers, Gross Negligence, and the Loophole in the Connecticut Good Samaritan Statute*, 19 QUINNIPIAC L. REV. 419, 425 (2000) (balancing the patient's interest in recovering damages for substandard care against the promotion of quality care from physicians).

296. Reuter, *supra* note 78, at 188.

297. *See* discussion *supra* Part IV.B (considering the impact on physicians).

298. Reuter, *supra* note 78, at 191.

299. *See Chamley*, ¶ 57, 730 N.W.2d at 878 (Crothers, J., concurring in part, dissenting in part) (stating that the majority is putting future emergency patients at risk because physicians no longer have an incentive to help).

300. *See id.* ¶ 43, 730 N.W.2d at 874-75 (stating the majority imposes an implicit duty upon Dr. Khokha to aid all patients entering the hospital); *see also id.* ¶ 44, 730 N.W.2d at 875 (stating that there was another physician who refused to help and was not punished for his failure to assist); Brief of Appellee Mercy Medical Center, *supra* note 4, at 8 (stating the other physician was also an employee of the hospital).

301. *See Chamley*, ¶ 43, 730 N.W.2d at 874-75 (implying that all similarly situated physicians would also have this implicit duty imposed upon them).

302. *See* Nelson v. Gillette, 1997 ND 205, ¶ 10, 571 N.W.2d 332, 334 (citing Binstock v. Fort Yates Pub. Sch. Dist., 463 N.W.2d 837, 842 (N.D. 1990)) (stating employers can be held vicariously liable for the torts committed by their employees during the course of employment); Halverson v. Zimmerman, 232 N.W. 754, 757 (N.D. 1930) (explaining that a duty is the first element required to establish professional negligence).

D. POSSIBLE CLARIFICATIONS

While some states impose a statutory obligation upon physicians to render assistance in an emergency, North Dakota does not.[303] The legislature has not codified a duty to aid others, but has enacted immunity provisions within its Good Samaritan Act.[304] However, through the majority opinion, a duty is imposed on physicians to provide care during emergencies that occur within the hospital where they are employed.[305]

The legislature may need to amend the Act in order to clarify the duty imposed by the court.[306] Both Justice Maring and Justice Crothers discussed the role of the legislature within their opinions.[307] Action by the legislature may be necessary in order to clarify definitions and policy positions behind the Act.[308]

The legislature could rewrite the general Good Samaritan statute, Section 32-03.1-02, to change it from a vague statute to one that either expressly includes or excludes hospital settings.[309] By doing this, the legislature would clearly identify its intent behind the Act and avoid the tension discussed in *Chamley*.[310] A second option would be to clarify the exceptions statute, Section 32-03.1-05, to identify if and when physicians can claim immunity under the Act.[311] *Chamley* helped to define this, but due to

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303. *See* Reuter, *supra* note 78, at 164 (stating that Minnesota and Vermont impose an obligation on physicians to render assistance and that the failure to do so constitutes a misdemeanor). Both Minnesota and Vermont impose a general obligation for everyone who knows of an emergency to provide care; this obligation is not specifically directed at physicians. MINN. STAT. ANN. § 604A.01(1) (2008); VT. STAT. ANN. tit. 12, § 519(a) (2007). *But see* N.D. CENT. CODE §§ 32-03.1-01 to -08 (1996 & Supp. 2007) (having no affirmative duty to render assistance).

304. *See* N.D. CENT. CODE §§ 32-03.1-01 to -08 (imposing no obligations to render aid).

305. *See Chamley*, ¶ 43, 730 N.W.2d at 874-75 (Crothers, J., concurring in part, dissenting in part) (identifying an implicit duty within the majority's opinion).

306. *See id.* ¶¶ 37, 39, 43, 59, 730 N.W.2d at 873-75, 878. Justice Maring noted the conflict behind the majority's interpretation of §§ 32-03.1-04 and 32-03.1-02.1 of the North Dakota Century Code. *Id.* ¶ 37, 730 N.W.2d at 873-74. She also urged the legislature to take action by adding definitions to the Act. *Id.* ¶ 39, 730 N.W.2d at 874. Justice Crothers disagreed with the majority's imposition of an implicit duty. *Id.* ¶ 43, 730 N.W.2d at 874-75. He also stated that it is the role of the legislature to identify policy considerations behind the Code. *Id.* ¶ 59, 730 N.W.2d at 878.

307. *Id.* ¶¶ 24-39, 43-59, 730 N.W.2d at 869-78.

308. *See id.* (noting a lack of clarity within the Act and the presence of conflicting policy provisions behind the statutes within the Act).

309. *See id.* ¶ 29, 730 N.W.2d at 871 (citing Velazquez v. Jimenez, 798 A.2d 51, 51-59 (N.J. 2002)) (identifying three forms of construction for Good Samaritan laws); *see also supra* note 82 and accompanying text (discussing the three forms).

310. *See Chamley*, ¶¶ 13, 27, 51, 730 N.W.2d at 868, 870-71, 876 (noting the tension within the justices' writings).

311. *See* N.D. CENT. CODE § 32-03.1-05 (1996 and Supp. 2007) (creating two loopholes in the exception which allow for the claim of immunity: (1) if the physician is not employed for the

the split of the court, the legislature may want to take an affirmative stance.[312] A third option for the legislature would be to add another definition into Section 32-03.1-01 to establish a definition for the "expectation of remuneration."[313] The legislature could delineate what it meant rather than allowing dictionary definitions to define the phrase.[314] These possible amendments within the Act would further clarify the intent and purpose behind the Act.[315]

V. CONCLUSION

Chamley clarifies North Dakota law under the Good Samaritan Act by providing the court another opportunity to interpret the Act.[316] Physicians are now precluded from immunity under this Act when they are salaried physicians who are responding to an emergency within the hospital where they are employed.[317] This eliminates a possible defense for medical malpractice under North Dakota law.[318]

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purpose of rendering emergency care, or (2) if the physician is acting outside the regular course of his or her employment).

312. *See Chamley*, ¶¶ 1, 22, 42, 730 N.W.2d at 865, 869, 874 (splitting the court into three separate writings).

313. *See* N.D. CENT. CODE § 32-03.1-01 (defining terms within the Act). This is seemingly where Justice Maring urged the legislature to make the change to identify physicians in hospitals as a class that is prevented from seeking immunity. *See Chamley*, ¶ 39, 730 N.W.2d at 874 (requesting a definition for "with an expectation of remuneration" to exclude those who "ordinarily receive remuneration").

314. *See Chamley*, ¶¶ 12, 26, 730 N.W.2d at 868, 870 (defining terms according to their dictionary meanings).

315. *See id.* ¶¶ 38, 59, 730 N.W.2d at 874, 878 (noting a lack of clarity behind some of the policy of the statutes); *see also id.* ¶ 51, 730 N.W.2d at 876 (noting the tension within Section 32-03.1-04.)

316. *See id.* ¶ 1, 730 N.W.2d at 865 (stating that because Dr. Khokha had an expectation of remuneration, he could not be granted immunity under the Good Samaritan Act).

317. *Id.* ¶ 18, 730 N.W.2d at 869.

318. *See* N.D. CENT. CODE § 32-03.1-02 (barring suit when reasonable care is provided during an emergency, subject to the exception for physicians who have an expectation of remuneration).

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