

A06-0025  
A05-340  
A05-1952  
State of Minnesota  
In Supreme Court

---

Brown-Wilbert, Inc., a Minnesota corporation, and  
Christopher Chandler Brown, an individual,

Petitioners/Appellants,

v.

Copeland Buhl & Company, P.L.L.P., and  
Lee Harren, an individual,

Respondents.

---

**BRIEF AND APPENDIX OF PETITIONERS/  
APPELLANTS BROWN-WILBERT, INC.  
AND CHRISTOPHER CHANDLER BROWN**

---

Kay Nord Hunt, #138289  
LOMMEN, ABDO, COLE, KING &  
STAGEBERG, P.A.  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 339-8131

George E. Antrim, III, #120534  
GEORGE E. ANTRIM, III, PLLC  
201 Ridgewood Avenue  
Minneapolis, MN 55403  
(612) 872-1313

**Attorneys for Petitioners**

Thomas J. Shroyer, #100638  
Peter A. Koller, #150459  
Julia M. Dayton, #319181  
MOSS & BARNETT  
4800 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402  
(612) 347-0300

**Attorneys for Respondents**

**TABLE OF CONTENTS**

STATEMENT OF THE ISSUES ..... 1

STATEMENT OF THE CASE AND FACTS ..... 2

    A.    Facts Leading to This Lawsuit ..... 2

        1.    The Plaintiffs ..... 2

        2.    History of Chandler-Wilbert, Inc. .... 3

        3.    Chris and Jerry incorporate Brown, Inc. and proceed to  
            purchase Chandler-Wilbert, Inc. .... 4

        4.    The Accountants assumed an advocacy role and failed to act  
            in accord with professional standards ..... 5

    B.    Plaintiffs’ Lawsuit Against the Accountants ..... 7

        1.    The Complaint ..... 7

        2.    Overview of Minn. Stat. § 544.42 ..... 8

        3.    Plaintiffs did not serve with the Summons and Complaint an  
            affidavit of expert review and no demand was made by the  
            Accountants for an affidavit of expert review ..... 9

        4.    Accountants move to dismiss this lawsuit ..... 10

            a.    Accountants’ basis for seeking dismissal ..... 10

            b.    Plaintiffs’ response to Accountants’ motion to dismiss ... 11

    C.    Accountants’ Reply ..... 12

    D.    The Motion Hearing ..... 13

    E.    The Trial Court Orders Dismissal of This Lawsuit ..... 14

    F.    Plaintiffs’ Appeal and the Ruling by the Court of Appeals ..... 15

G. This Court’s Grant of Further Review . . . . . 16

ARGUMENT . . . . . 16

I. ACCOUNTANTS DID NOT MAKE A DEMAND FOR THE MINN. STAT. § 544.42 AFFIDAVIT OF EXPERT REVIEW AND THEREFORE DISMISSAL COULD NOT BE ORDERED AS A PENALTY FOR PLAINTIFFS’ FAILURE TO SUBMIT THE AFFIDAVIT . . . . . 16

    A. Standard of Review . . . . . 16

    B. Accountants Did Not Make a Demand for the Affidavit . . . . . 17

II. THE SECOND AFFIDAVIT REQUIREMENT WAS MET BY PLAINTIFFS’ ANSWERS TO INTERROGATORIES AND IF THE ANSWERS ARE DEFICIENT, PLAINTIFFS ARE ENTITLED TO A 60-DAY PERIOD TO CURE ANY FOUND DEFICIENCIES . . . . . 20

    A. Answers to the Expert Interrogatory Were Provided Within 180 Days of Commencement of This Action . . . . . 20

    B. Plaintiffs Were Denied Safe Harbor as Mandated by Minn. Stat. § 544.42, subd. 6(c) . . . . . 22

    C. Minn. Stat. § 544.42, subd. 6(c) Eliminates the Harsh Result that Existed Under the Medical Malpractice Expert Review Statute . . . . . 23

    D. Plaintiffs Are Entitled to an Opportunity to Cure any Found Deficiencies . . . . . 25

CONCLUSION . . . . . 26

## TABLE OF AUTHORITIES

### Statutes:

Minn. Stat. § 145.682 .....	21, 23-25
Minn. Stat. § 145.682, subd. 4 .....	21
Minn. Stat. § 145.682, subd. 6 .....	17
Minn. Stat. § 145.682, subd. 6(c) (2002) .....	25
Minn. Stat. § 544.42 (2004) .....	2, 8, 9, 11, 13, 14, 16-21, 23-25
Minn. Stat. § 544.42, subd. 2 .....	8
Minn. Stat. § 544.42, subd. 2(1) .....	8
Minn. Stat. § 544.42, subd. 2(2) .....	8, 12
Minn. Stat. § 544.42, subd. 3 .....	10, 14
Minn. Stat. § 544.42, subd. 3(a)(1) .....	8, 19
Minn. Stat. § 544.42, subd. 4 .....	14, 20
Minn. Stat. § 544.42, subd. 4(a) .....	8
Minn. Stat. § 544.42, subd. 4(b) .....	20
Minn. Stat. § 544.42, subd. 6 .....	1, 2, 8, 11, 12, 16, 23, 26
Minn. Stat. § 544.42, subd. 6(a) .....	8, 17
Minn. Stat. § 544.42, subd. 6(c) .....	15, 22-25
Minn. Stat. § 645.16 .....	18
Minn. Stat. § 645.17, subd. 2 .....	1, 18

### Cases:

American Family Ins. Group v. Schroedl 616 N.W.2d 273 (Minn. 2000) .....	18
Hince v. O'Keefe 632 N.W.2d 577 (Minn. 2001) .....	1, 18
House v. Kelbel 105 F. Supp.2d 1045 (D. Minn. 2000) .....	22
Lindberg v. Health Partners, Inc. 599 N.W.2d 572 (Minn. 1999) .....	24
Paulos v. Johnson 502 N.W.2d 397 (Minn. Ct. App. 1993), rev. den .....	17

Sorenson v. St. Paul Ramsey Medical Center  
457 N.W.2d 188 (Minn. 1990) ..... 1, 16, 17, 24, 26

Teffeteller v. University of Minnesota  
645 N.W.2d 420 (Minn. 2002) ..... 25

**Other:**

Webster's New World Collegiate Dictionary (4<sup>th</sup> ed. 2001) ..... 18

## STATEMENT OF THE ISSUES

This Court has granted review as to the following issues:

- I. WHAT CONSTITUTES A “DEMAND” FOR COUNSEL’S AFFIDAVIT OF EXPERT REVIEW THAT TRIGGERS THE 60-DAY PERIOD UNDER MINN. STAT. § 544.42, SUBD. 6?

Minn. Stat. § 645.17(2).

Hince v. O’Keefe, 632 N.W.2d 577 (Minn. 2001).

- II. WHAT IS THE MINIMUM STANDARD FOR AN AFFIDAVIT OF EXPERT IDENTIFICATION SUFFICIENT TO ENTITLE THE PLAINTIFF TO NOTICE OF DEFICIENCIES AND AN OPPORTUNITY TO CURE UNDER MINN. STAT. § 544.42, SUBD. 6?

Sorenson v. St. Paul Ramsey Medical Center, 457 N.W.2d 188 (Minn. 1990).

## STATEMENT OF THE CASE AND FACTS

Appellants/Plaintiffs Brown-Wilbert, Inc.'s ("Brown-Wilbert") and Christopher Chandler Brown's ("Chris") claims against Respondents/Defendants Copeland Buhl and Company, P.L.L.P. ("Copeland Buhl") and Lee Harren ("Harren") were ordered dismissed by the trial court for purported failure to comply with the expert review requirements of Minn. Stat. § 544.42 (2004).<sup>1</sup> (A. 5.) It is Plaintiffs' position that the safe harbor provisions contained in Minn. Stat. § 544.42, subd. 6, protect all of their claims against Accountants from mandatory dismissal under the auspices of Minn. Stat. § 544.42.

Plaintiffs will briefly outline for the Court the underlying facts that led to the filing of this lawsuit. Plaintiffs will then focus on the facts with regard to the progression of this lawsuit and the ordered dismissal.

### **A. Facts Leading to This Lawsuit.**

#### **1. The Plaintiffs.**

Brown-Wilbert is a Minnesota corporation that manufactures burial vaults, septic tanks and other concrete products. (A. 22.) It also arranges for their distribution and sale throughout the Upper Midwest. (Id.) Brown-Wilbert is the successor, by way of statutory merger, to Chandler-Wilbert, Inc. (Id.) Chris is the great-grandson of the founder of

---

<sup>1</sup> When Appellants Brown-Wilbert, Inc. and Christopher Chandler Brown are jointly referred to, they will be referred to as "Plaintiffs." When Copeland Buhl & Company, P.L.L.P. and Lee Harren are jointly referred to, they will be referred to as "Accountants."

Chandler-Wilbert, Inc., Henry Fritz Chandler. Chris now owns 100% of Brown-Wilbert. (Id.)

## 2. History of Chandler-Wilbert, Inc.

In 1943, Bud Chandler, the maternal grandfather of Chris, purchased Chandler-Wilbert, Inc. from his father, Henry Fritz Chandler. The business enjoyed growth under Bud Chandler. To meet the demand for the products, the company's facilities increased from one factory to sixteen. (Id.)

Chris lived next door to his grandfather, Bud. Chris and Bud enjoyed a very close relationship. From the time he was young, Chris wanted to own the company that his grandfather successfully steered for so many years. (Id.)

Bud Chandler died in 1972. His wife, Lucy Chandler Lake ("Lucy"), took over the daily operation of the company. Trusts established for the benefit of Lucy and the three daughters of Lucy and Bud (which included Chris' mother, Marge Chandler Johnson ("Marge")) became the owners of all of the company stock ("Trusts"). Lucy remained in charge of Chandler-Wilbert, Inc. until the Trusts sold it in 1995. (Id.)

In approximately 1993, the company's shareholders, who were beneficiaries of the Trusts, initiated discussions regarding selling the company. (A. 23.) Lucy hoped that Chris would ultimately take over the Chandler family business. The purchase of the shares of Chandler-Wilbert, Inc. from the Trusts was complicated by the relationship between Jerry Brown (Marge's ex-husband and Chris' father) and the beneficiaries of the Trusts. (Id.)

Jerry Brown (“Jerry”) and Marge were married in 1958. Bud hired Jerry to work for Chandler-Wilbert, Inc. as a salesman the same year. Marge and Jerry were divorced in 1970, but Jerry continued to work for Chandler-Wilbert, Inc. after the divorce. After Lucy took over the daily operations of the company, her relationship with Jerry became strained and in 1982 she nearly fired him. Instead, she told him he could come back to work once he agreed to make some major life changes. The other beneficiaries of the Trusts also had strained relationships with Jerry. They were only willing to sell the company to Jerry and Chris if Chris became the majority owner. (Id.) When Chris and Jerry planned the purchases of all of the stock of Chandler-Wilbert, Inc., Chris and Jerry agreed Chris would buy the majority of the equity in the company and that Chris and Jerry would share control of the company on a 50/50 basis. (Id.)

**3. Chris and Jerry incorporate Brown, Inc. and proceed to purchase Chandler-Wilbert, Inc.**

Chris and Jerry incorporated Brown, Inc. (A. 23.) During the summer of 1995, the plan to purchase Chandler-Wilbert, Inc. consistently called for Jerry and Chris to each own 50% of the voting stock in the company. (A. 24.) Jerry already had a personal accountant, Harren and the accounting firm of Copeland Buhl. (Id.)

The Accountants were engaged to assist both Chris and Jerry with the purchase of Chandler-Wilbert, Inc. (Id.) While Chris handled matters locally, Jerry and Harren took trips to Chicago to meet with Wilbert, Inc., the licensor of the vault products sold by the

company. Copeland Buhl was paid \$15,000 for its initial retainer on July 19, 1995. (Id.)

The Accountants became Brown, Inc.'s auditor. (A. 25.)

**4. The Accountants assumed an advocacy role and failed to act in accord with professional standards.**

The Accountants, instead of providing independent advice and exercising due professional care, assumed an advocacy role to the detriment of Brown, Inc. and Chris.

Harren began advocating Jerry's interests as to the purchase of Chandler-Wilbert, Inc. After returning from one of their trips to Chicago, Jerry and Harren presented Chris with a plan whereby Chris would own 80% of the equity in the company but Jerry would own 51% of the voting shares. Trusting his father and Harren, Chris agreed to this proposal only because he was led to believe by them that Wilbert, Inc. had insisted upon it as a condition for the loan of \$1,000,000 to Brown, Inc. to help finance the purchase. (A. 24.) The transaction for purchase of the company closed in December 1995, and Chandler-Wilbert, Inc. was statutorily merged into Brown, Inc. (Id.)

The loan by Wilbert, Inc. was fully repaid by December 1997. This repayment removed the alleged obstacle to Chris obtaining control of Brown-Wilbert commensurate with his 80% majority equity interest in the company. The Accountants knew the Wilbert, Inc. loan was paid off, but did nothing to bring this to the attention of Chris. (A. 24-25.)

The Accountants were not independent as required and acted in violation of professional standards. The actions of the Accountants are set out in great detail in the

Complaint and in the Affidavit of George E. Antrim, III, and will not be repeated in detail here. (See A. 25-34, 98-109.) Accountants' actions of which Plaintiffs complain include such things as

- accepting personal payoffs from Jerry (A. 33)
- presenting inaccurate and misleading financial information to support Jerry's proposed buyout price and withholding of information from Chris and the corporation (A. 27, 29, 30, 31)
- failing to extend proper due diligence in reviewing documents, including documents that contained the forged signature of Chris (A. 34)
- providing litigation support services and actions against the interests of Chris, the majority shareholder, at the same time that audit services were being provided to Brown-Wilbert (A. 30-32)
- failing to apply the same standards in evaluating company versus personal expenses of all of the shareholders of Brown-Wilbert (A. 25, 27)
- inaccurate reporting of Brown-Wilbert expenses in audited financial statements (A. 26, 100)
- assuming an advocacy role for Jerry, the minority equity shareholder, to the detriment of Brown-Wilbert (A. 25, 29)

Accountants pressured Chris to sell his shares in Brown-Wilbert to Jerry.

Exasperated by the continuing pressure of the Accountants, Chris commenced a shareholder's rights lawsuit against Jerry, contending that he had a right to continued employment with Brown-Wilbert and that he was entitled to buy out Jerry's interest in the company. (A. 30.) Both before and after the commencement of that litigation, the Accountants unequivocally sided with Jerry. (A. 30.)

In 2003, the shareholder's lawsuit was settled. To that end, the parties executed a contract whereby Chris would become the sole owner of Brown-Wilbert by purchasing all of Jerry's shares. (Shroyer Affidavit, Exhibit F.)

**B. Plaintiffs' Lawsuit Against the Accountants.**

**1. The Complaint.**

On March 10, 2004, Plaintiffs brought this lawsuit against the Accountants.

(A. 21.) Four counts are asserted in the Complaint.

In Count I, entitled "Breach of Contract," Plaintiffs assert that the Accountants had annual contracts with engagement letters executed by them and Brown-Wilbert. Plaintiffs assert that the Accountants breached their annual contracts with Brown-Wilbert, resulting in damage to the Plaintiffs. (A. 34)

In Count II, entitled "Breach of Fiduciary Duty," Plaintiffs assert that the Accountants owed a fiduciary duty to Plaintiffs, which the Accountants breached. (Id.) Accountants "took money under the table" and had "acquiesced in forgeries" of documents. This resulted in damages to the Plaintiffs. (Id.)

In Count III, entitled "Accounting Malpractice," Plaintiffs assert that the Accountants had a duty to Brown-Wilbert and its majority shareholder, Chris. It was further asserted that the breach of the duty owed by the Accountants constituted a breach of the standard of care owed by accountants, resulting in damage to Plaintiffs. (A. 35.)

Count IV, entitled "Restitution," asserts entitlement to repayment of the amounts paid to the Accountants by Brown-Wilbert. (A. 35-36.)

## 2. Overview of Minn. Stat. § 544.42.

In an action against a professional alleging negligence or malpractice where expert testimony is needed to establish a prima facie case, the plaintiff is to comply with the expert disclosure requirements as set out in Minn. Stat. § 544.42, subd. 2. (A. 17.) The first affidavit, an affidavit of expert review, establishes that the plaintiff's attorney had reviewed the case with an expert. Id., subds. 2(1), 3(a)(1). (Id.) The second affidavit, the expert identification affidavit, identifies the expert the plaintiff expects to call at trial and provides the substance and a summary of the grounds for each of the expert's opinions. Id., subds. 2(2), 4(a). (A. 17-18.) This affidavit requirement may be met by providing answers to interrogatories if they are signed by the party's attorney and served within 180 days after commencement of the action. (Id.)

Minn. Stat. § 544.42, subd. 6 sets out the penalty for noncompliance – mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a prima facie case. Subdivision 6 also contains safe harbor provisions which provide an opportunity for parties to cure any deficiencies before dismissal of a cause of action can be ordered. With regard to the first affidavit, the affidavit of expert review, mandatory dismissal is not to be granted unless the moving party makes a demand for the affidavit and it is not supplied within 60 days of that demand. Id. at subd. 6(a). (A. 18.) As to the expert identification requirement, a party must be given 60 days to correct any court determined deficiencies of the affidavit or answers to interrogatories. (A. 18.)

**3. Plaintiffs did not serve with the Summons and Complaint an affidavit of expert review and no demand was made by the Accountants for an affidavit of expert review.**

Plaintiffs did not serve with the Summons and Complaint an affidavit of expert review. On April 9, 2004, the Accountants served their Answer and Counterclaim. In their Answer and Counterclaim, the Accountants did not demand the affidavit of expert review. (A. 38.)

Sometime thereafter, the Accountants served Interrogatories on Plaintiffs, including interrogatories seeking information as to the experts Plaintiffs planned to call for trial. (A. 46.) In their Interrogatories, the Accountants did not reference Minn. Stat. § 544.42 or otherwise demand an affidavit of expert review. (Id.) The record does not reflect when Accountants served its Interrogatories on Plaintiffs.<sup>2</sup>

Plaintiffs served their Answers to Accountants' Interrogatories on June 18, 2004, which was 100 days after the suit was commenced. (Id.) Plaintiffs answered Accountants' expert witness interrogatory and in doing so identified two experts. (A. 47.) The Accountants did not assert that the answers provided were insufficient or otherwise seek to compel answers by asserting the responses were incomplete.

---

<sup>2</sup> Accountants in their reply memorandum asserted May 18, 2004 as the service date, but the record is devoid of any support for that statement.

**4. Accountants move to dismiss this lawsuit.**

**a. Accountants' basis for seeking dismissal.**

On September 21, 2004, Accountants sought dismissal of this lawsuit asserting “[b]ecause the Plaintiffs failed to comply with the requirements of Minn. Stat. § 544.42 this action is frivolous per se and the Court must grant this motion.” (Defendant’s Memorandum of Law in Support of Motion to Dismiss or in the Alternative for Summary Judgment dated 9/21/04, p. 1.) As to the first affidavit, the affidavit of expert review, the Accountants asserted Plaintiffs had not served the Minn. Stat. § 544.42, subd. 3 affidavit of expert review. (Id. at p. 9). Notably, Accountants did not assert in their memorandum that they had made a demand for such an affidavit.

As to the second affidavit, the expert identification affidavit which can be met by answers to interrogatories, Accountants acknowledged Plaintiffs had answered their expert witness interrogatory and had identified two experts. Accountants contended, however, that as to the subject matter, substance of opinions and grounds on which the experts’ opinion is based Plaintiffs’ “effort to comply with Minn. Stat. § 544.42” was conclusory and vague. (Id. at p. 6.)

In addition, Accountants sought summary judgment on the ground that, based on the releases executed to end the litigation between Chris and Jerry, the action against the Accountants should be dismissed. (Id. at pp. 11-17.)

**b. Plaintiffs' response to Accountants' motion to dismiss.**

In response, Plaintiffs explained that no demand for the first affidavit, the affidavit of expert review, had been made. In fact, Plaintiffs were first made aware of Minn. Stat. § 544.42 when Plaintiffs were served with the motion to dismiss on September 21, 2004. (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss dated 10/15/04, p. 16.) If Plaintiffs' counsel had been made aware of this statute by a demand, counsel would have submitted the requisite affidavit. (Id. at pp. 15-16; see A. 115.)

As to the second affidavit requirement -- identification of experts within 180 days after the commencement of the action -- this requirement was met by Plaintiffs' Answers to Interrogatories. (Id. at p. 16.) Plaintiffs served their Answers on June 18, 2004, which was well within the 180 days after the action was commenced on March 10, 2004.

Plaintiffs explained:

These Answers and the Complaint they incorporated set forth extensive facts and anticipated expert opinions. They not only disclosed the identity of Plaintiffs' expert accountants, but provided pages of curricula vitae and prior testimony of these experts as well. Plaintiffs respectfully suggest that they have already complied with Subd. 4 through their Answers to Interrogatories. This case should therefore not be dismissed based on Subd. 2(2).

(Id. at p. 17.)

Pursuant to Minn. Stat. § 544.42, subd. 6, Plaintiffs further asserted that if there are deficiencies in the Answers to Interrogatories, dismissal is not to be ordered "unless, after notice by the court, the nonmoving party is given 60 days to satisfy the disclosure

requirements.” (Id. at pp. 16-17; A. 18.) Although no notice had been given by the court, in response to the Accountants’ claimed deficiencies in Plaintiffs’ Answers to Interrogatories, Plaintiffs’ counsel submitted an Affidavit seeking to supplement and respond to the Accountants’ assertions of deficiency. (Id. at p. 17; A. 95.) If this Affidavit failed to cure any claimed deficiency of the Minn. Stat. § 544.42, subd. 2(2) expert disclosure, the trial court was required to issue specific findings as to the deficiencies and to provide Plaintiffs with the requisite 60 days to remedy. (Id. at p. 22.)

As to Accountants’ alternative ground of dismissal, Plaintiffs did not release Accountants when they settled the previous litigation. The claims against Accountants were specifically reserved. (Plaintiffs’ Memorandum, pp. 17-22.)

**C. Accountants’ Reply.**

In its Reply Memorandum, Accountants claimed that their service of the First Set of Interrogatories on Plaintiffs should be construed as a demand for the affidavit of expert review, triggering the 60-day compliance period set forth in Minn. Stat. § 544.42, subd. 6. (Defendants’ Reply Memorandum dated 10/22/04, p. 5.) Specifically, the Accountants claim that the following interrogatory put Plaintiffs “on notice” that they had failed to secure the affidavit of expert review:

List the name and current or last address of each person or party known or believed by plaintiffs or their attorneys to have any knowledge of the facts surrounding this matter and, for each, separately state the substance of their knowledge.

(Id. at p. 5; Shroyer Affidavit, Exhibit D, p. 3.)

As to Plaintiffs' answer to the expert interrogatory, the Accountants argued that "no good faith effort to comply with the statute's requirements could be inferred from those answers." (Id. at p. 7.) Accountants further argued that Plaintiffs' supplementation in response to Accountants' claimed deficiencies in the answer to the expert interrogatory was "too late." (Id. at p. 8.)

**D. The Motion Hearing.**

The motion hearing was held on November 2, 2004. At that hearing, Plaintiffs' counsel made clear that he did not know about Minn. Stat. § 544.42 until served with Accountants' motion to dismiss. (T. 14-15.) If Plaintiffs had been made aware of the statute, Plaintiffs "certainly would have submitted an Affidavit." (T. 14-15.) As to the second affidavit requirement, Plaintiffs asserted that it is met by their answers to Accountants' expert interrogatory. (T. 16.) Counsel further explained to the trial court:

Then the question is did we substantively do OK. And that's what the Court has before it now. So Subdivision 6(c) kicks in. And if the Court finds that between our interrogatory answers which [Accountants' counsel] submitted to the Court and between the Affidavit that I supplemented our interrogatory answers to the Court on October 15th, if the Court finds that those are in any way deficit, then the Court is to tell me about what the deficiencies are and Subdivision C requires that I be allowed 60 days to cure the deficiencies."

(T. 16-17.) Plaintiffs' counsel also made an oral motion for an extension for good cause shown. (T. 21.)

**E. The Trial Court Orders Dismissal of This Lawsuit.**

By Order dated December 23, 2004, the trial court, the Honorable Alan Oleisky, dismissed this action concluding the requirements of Minn. Stat. § 544.42 were not met. (A. 5.) The trial court did not address Accountants' alternative argument for dismissal based on the executed releases.

With regard to the first affidavit, the Minn. Stat. § 544.42, subd. 3 affidavit of expert review, the trial court reasoned that no affidavit was filed in a timely manner because the Accountants "demanded this affidavit on May 18, 2004, yet Plaintiffs submitted it on October 15, 2004, clearly outside the 60 day requirement of subd. 6(a)."<sup>3</sup> (A. 12.)

As to the second affidavit, the Minn. Stat. § 544.42, subd. 4 affidavit of expert identification, the trial court concluded this request was not met because "Plaintiffs' Answer to Interrogatories are wholly insufficient under § 544.42 subds. 2(2)" and therefore "no affidavit has been timely filed." (A. 14.) The trial court's memorandum concludes:

For the reasons stated above this Court grants Defendants' motion to Dismiss due to Plaintiffs failure to comply with Minnesota Statute § 544.42 in filing an action against professionals therefore, each cause of action where expert testimony is to be used to establish a prima facie case shall

---

<sup>3</sup> May 18, 2004 is the date referenced in Accountants' Reply Memorandum as the date it served Interrogatories on Plaintiffs. (Defendants' Reply Memorandum, p. 5.) As previously stated, there is nothing in the record as to when those Interrogatories were served on Plaintiffs other than Accountants' unsupported statements in their Reply Memorandum. Plaintiffs answered those Interrogatories on June 18, 2004.

[be] dismissed with prejudice pursuant to the penalty for noncompliance under MINN. STAT. § 544.42, subd. 6(b).

(A. 14.) The trial court did not address Plaintiffs' oral motion for an extension for good cause shown. Final judgment was entered on December 27, 2004.

**F. Plaintiffs' Appeal and the Ruling by the Court of Appeals.**

Plaintiffs appealed the dismissal. The Court of Appeals affirmed in part and remanded. (A. 1.)

The Court of Appeals acknowledges that the Accountants "never made a demand specifically for the affidavit of expert review" and "[t]he interrogatories did not specifically mention Minn. Stat. § 544.42 or use the word 'affidavit.'" (A. 2.) Nonetheless, the Court of Appeals held that "although [Accountants'] interrogatories may not have been a clear demand for the affidavit of expert review," the Accountants' "request for interrogatories was effectively the demand for the affidavit and that [Plaintiffs] failed to provide the affidavit in a timely fashion." (A. 3.) The Court of Appeals therefore affirmed the dismissal of the accounting malpractice count of Plaintiffs' Complaint, concluding expert testimony was necessary to establish a prima facie case. (Id.) As to the other counts of the Complaint, the Court of Appeals remanded them to the trial court to determine whether any of those counts required expert testimony to establish a prima facie case. (Id.)

As to the second affidavit -- expert identification -- the Court of Appeals did not address the trial court's ruling. It did note that Minn. Stat. § 544.42, subd. 6(c) required

the district court – irrespective of the nature or severity of the deficiencies in the affidavit or interrogatory answers – to provide Plaintiffs with an opportunity to cure. (A. 3.) Plaintiffs were given no such opportunity. The Court of Appeals also did not address the issue of whether the releases provided an alternative ground for dismissal of this lawsuit, but remanded that issue for district court determination. (A. 1.)

**G. This Court’s Grant of Further Review.**

Plaintiffs sought further review by this Court which was granted on February 14, 2006. This Court states that review is granted as to the following issues: (1) what constitutes a “demand” for counsel’s affidavit of expert review that triggers the 60-day period under Minn. Stat. § 544.42, subd. 6; and (2) what is the minimum standard for an affidavit of expert identification sufficient to entitle the plaintiff to notice of deficiencies and an opportunity to cure under Minn. Stat. § 544.42, subd. 6. (A. 15.) Accountants’ cross petition as to the effect of the releases was denied. (Id.)

**ARGUMENT**

**I. ACCOUNTANTS DID NOT MAKE A DEMAND FOR THE MINN. STAT. § 544.42 AFFIDAVIT OF EXPERT REVIEW AND THEREFORE DISMISSAL COULD NOT BE ORDERED AS A PENALTY FOR PLAINTIFFS’ FAILURE TO SUBMIT THE AFFIDAVIT.**

**A. Standard of Review.**

As a general rule, “[a] trial court’s dismissal of an action for procedural irregularities will be reversed on appeal only if it is shown that the trial court abused its discretion.” Sorenson v. St. Paul Ramsey Medical Center, 457 N.W.2d 188, 190 (Minn.

1990), reh'g den. “Statutory construction, however, is a question of law and subject to de novo review on appeal.” Id. This case presents to this Court an issue of statutory construction as applied to undisputed facts. Therefore, this Court has de novo review. BFW Co. v. County of Ramsey, 566 N.W.2d 702, 704 (Minn. 1997).

**B. Accountants Did Not Make a Demand for the Affidavit.**

In enacting Minn. Stat. § 544.42, the Legislature specifically provided for the subdivision 6 safe harbor provision so that litigants could avoid the harsh consequences that arise from failure to comply with the statute’s expert review provisions. Minn. Stat. § 544.42, subd. 6(a), like Minn. Stat. § 145.682, subd. 6, which governs health care provider malpractice actions, states:

Failure to comply with subdivision 2, clause (1), within 60 days after demand for the affidavit results, upon motion, in mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a prima facie case.

Accordingly, dismissal is only called for under the penalty portion of the statute if plaintiff fails to submit an affidavit within 60 days after demand for the affidavit.

Accountants did not make any such demand.

The Minnesota Court of Appeals has long interpreted the “demand for the affidavit” provision as evincing “the evident concern of the legislature that plaintiffs be fully apprised of the expert review laws.” Paulos v. Johnson, 502 N.W.2d 397, 399 (Minn. Ct. App. 1993), rev. den. The words used by the Legislature could lead to no other conclusion.

Basic rules of statutory construction instruct that words and phrases in a statute are to be given their plain and ordinary meaning. Hince v. O'Keefe, 632 N.W.2d 577, 582 (Minn. 2001). Courts must presume that the Legislature intends to give effect to all the provisions of the statute, Minn. Stat. § 645.17(2), and must construe every law, if possible, in order to give effect to all of its provisions. Minn. Stat. § 645.16. No word, phrase or sentence should be deemed superfluous, void or insignificant. American Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277-78 (Minn. 2000).

The plain and ordinary meaning of the word “demand” is “to ask for boldly” or “to call for as necessary.” Webster’s New World Collegiate Dictionary (4<sup>th</sup> ed. 2001). In order to demand the affidavit, the defendant must make a specific request to the plaintiff to provide the § 544.42 affidavit. This can be done in defendant’s answer or by separate letter. However requested, the defendant, at minimum, must reference § 544.42 or otherwise inform plaintiff of the existence of an expert review statute. The demand must be such that the plaintiff would understand that such a statute exists, and the need to review the statute so as to meet its requirements.

The clear purpose of the safe harbor demand provision is to apprise a party of the expert review statute and the need to serve the requisite affidavit. Accountants certainly did not do that. All Accountants provided to Plaintiffs was a routine set of interrogatories including questions regarding expert witnesses. The Interrogatories do not reference § 544.42 nor do they otherwise seek an affidavit drafted by the party’s attorney that states “the facts of the case have been reviewed by the party’s attorney with an expert whose

qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, the defendant deviated from the applicable standard of care and by that action caused injury to the plaintiff." The Interrogatories are not, as a matter of law, "a demand for the affidavit."

**C. The Court of Appeals Ruling Is Also Premised on a Basic Misunderstanding of Minn. Stat. § 544.42.**

In addition to the lower courts' rulings being contrary to the language of the statute as applied to the undisputed facts of record, the Court of Appeals ruling is also premised on a basic misunderstanding of § 544.42 and the record before it. Before initiating a lawsuit, there is no requirement that the plaintiff have retained the expert who will testify at trial, nor need the expert be identified in that first affidavit. As previously set forth, all plaintiff must do is consult with someone "whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, the defendant deviated from the applicable standard of care and by that action caused injury to the plaintiff" and plaintiff's attorney must so assert in his affidavit. Minn. Stat. § 544.42, subd. 3(a)(1).

In this case, the Court of Appeals leapt to the incorrect conclusion that no expert review was in fact conducted before this lawsuit was commenced based on an interrogatory answer which identified the experts who will testify at trial as having been "recently retained." (A. 3.) Before the action was commenced, the requisite expert review was conducted. As Plaintiffs' counsel explained, he did not file the affidavit

because he did not know of § 544.42's requirements until served with Accountants' motion to dismiss. If Accountants had made the requisite demand, the affidavit would have been filed.

To uphold the lower courts' rulings would be to introduce uncertainty into a statute which, as written, imposes certainty. It would also encourage dismissals by stealth. Accountants could easily have presented the requisite demand for the affidavit, but they did not. Plaintiffs respectfully request that the decision to dismiss any of their claims for failure to comply with Minn. Stat. § 544.42's first affidavit requirement be reversed because there was no demand made by Accountants for the affidavit.

**II. THE SECOND AFFIDAVIT REQUIREMENT WAS MET BY PLAINTIFFS' ANSWERS TO INTERROGATORIES AND IF THE ANSWERS ARE DEFICIENT, PLAINTIFFS ARE ENTITLED TO A 60-DAY PERIOD TO CURE ANY FOUND DEFICIENCIES.**

**A. Answers to the Expert Interrogatory Were Provided Within 180 Days of Commencement of This Action.**

The second affidavit requirement – expert identification – is to be signed by the parties' attorney “and state the identity of each person whom the attorney expects to call as an expert witness at trial to testify with respect to the issues of negligence, malpractice, or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.” Minn. Stat. § 544.42, subd. 4. Answers to interrogatories may satisfy the requirements of the subdivision if they are signed by the parties' attorney and served upon opponent within 180 days after commencement of the action against the defendant. Subdivision 4(b) further provides

that “[n]othing in this subdivision prevents any party from calling additional expert witnesses or substituting other expert witnesses.”<sup>4</sup>

This lawsuit was commenced on March 10, 2004. On June 18, 2004, which is within 180 days of the commencement of this action, Plaintiffs responded to the Accountants’ Interrogatories which included the following request:

Set forth the following for each person whom you expect to call as an expert witness at trial:

- (a) State the expert’s name, professional or business address and employer’s name;
- (b) State the expert’s area of expertise and the basis for that expertise;
- (c) Provide a list of the expert’s publications, papers and treatises, speeches, lectures and seminars;
- (d) State the subject matter on which the expert is expected to testify;
- (e) State the substance of the facts and opinions to which the expert is expected to testify;
- (f) Give a summary of the individual grounds for each opinion; and
- (g) Set forth the author, publisher, title and date of publication of each learned treatise upon which the expert will rely in testimony.

(A. 46-47.) Plaintiffs identified as experts Robert Tautges and William R. Legier. Both are Certified Public Accountants and Mr. Legier is also a Certified Fraud Examiner.

(A. 47.) The Accountants were provided with both experts’ curricula vitae and related materials. (A. 53-92.) The Accountants were informed that both experts were expected

---

<sup>4</sup> Minn. Stat. § 544.42, unlike § 145.682, does not require the affidavit or the answers to interrogatories to be signed by each expert listed. Minn. Stat. § 145.682, subd. 4.

to testify as to the conclusions set forth in the detailed Complaint based upon the facts alleged in the Complaint. (A. 47-48.) In response to Accountants' motion to dismiss, Plaintiffs further supplemented their expert disclosure, providing even greater detail as to the substance of the experts' opinions and a summary of grounds for each opinion. (A. 110-114.)

**B. Plaintiffs Were Denied Safe Harbor as Mandated by Minn. Stat. § 544.42, subd. 6(c).**

In dismissing this case, the trial court ruled as follows:

Plaintiffs' Answers to Interrogatories fail to identify the experts, state their opinions, and state the basis of these opinions as required by statute, and therefore fail to resemble the second affidavit. The Minnesota Supreme Court states that if Plaintiffs file an affidavit that is merely deficient, the court shall issue specific findings as to the deficiencies. *House*, 105 F. Supp.2d at 1051. Here, an affidavit has not been filed and Plaintiffs' Answer to Interrogatories are wholly insufficient under § 544.42 subds. 2(2).

(A. 13-14.) The trial court's statement that no experts were identified is contrary to the undisputed facts of record. As set forth in Plaintiffs' answer to the expert interrogatory, two well-qualified experts are identified.

The trial court's reference to House v. Kelbel, 105 F. Supp.2d 1045 (D. Minn. 2000), as a decision of this Court is also incorrect. Factually, in House, the plaintiff failed to present an affidavit or provide an answer to an expert interrogatory within 180 days of commencement of the lawsuit. Having failed to present any expert identification

within the 180 day period, the federal district court held the safe harbor provision of § 544.42, subd. 6(c) did not apply and ordered the action dismissed.

While Accountants have argued and the trial court held that the Answers to Interrogatories were insufficient as to the experts' opinions and the basis of those opinions, Minn. Stat. § 544.42, subd. 6 requires that the Plaintiffs be given 60 days to cure deficiencies after the trial court issues specific findings as to the deficiencies. Minn. Stat. § 544.42, subd. 6(c) provides:

Failure to comply with subdivision 4 results, upon motion, in mandatory dismissal of each action with prejudice as to which expert testimony is necessary to establish a prima facie case, provided that an initial motion to dismiss an action under this paragraph based upon claimed deficiencies of . . . answers to interrogatories shall not be granted unless, after notice by the court, the nonmoving party is given 60 days to satisfy the disclosure requirements in subdivision 4. In providing its notice, the court shall issue specific findings as to the deficiencies of the affidavit or answers to interrogatories.

Plaintiffs were denied their statutory right to safe harbor. Not only did the trial court not issue specific findings as to any deficiencies, it denied Plaintiffs any opportunity to cure.

**C. Minn. Stat. § 544.42, subd. 6(c) Eliminates the Harsh Result that Existed Under the Medical Malpractice Expert Review Statute.**

To uphold the trial court's ruling in this case would be to read the safe harbor provision specifically enacted by the Legislature out of the statute. By its addition of the subd. 6(c) safe harbor provision to Minn. Stat. § 544.42, the Legislature remedied a problem that had long been associated with Minn. Stat. § 145.682, the medical malpractice expert review statute. Under Minn. Stat. § 145.682 as originally enacted, the

Legislature had mandated that when the expert disclosure requirements were not sufficiently specific or procedurally perfect, the malpractice claim must be dismissed. As originally enacted in 1986, the malpractice expert review statute provided a plaintiff with no opportunity to cure or remedy any claimed deficiency.

In addressing the medical malpractice cases brought before it under § 145.682 where the expert identification was found to be inadequate, this Court continually acknowledged the “harsh results” but had concluded the statute “cuts with a sharp but clean edge” and that there was no opportunity to cure because it was the legislative choice to mandate dismissal. Lindberg v. Health Partners, Inc., 599 N.W.2d 572, 577 (Minn. 1999). This Court also recognized that “the sanction imposed [by § 145.682] is the abrupt termination with prejudice of what may be a meritorious cause of action, a sanction in sharp contrast with the judiciary’s traditional preference for the disposition of claims on their merits and a corresponding reluctance to require the parties to run a technical obstacle course.” Sorenson v. St. Paul Ramsey Medical Center, 457 N.W.2d at 192.

Rather than amend § 145.682 to add expert review for professionals other than health care providers, the Legislature in 1997 enacted a new statute – Minn. Stat. § 544.42. This statute applies to a “licensed attorney or an architect, certified public accountant, engineer, land surveyor, or landscape architect.” Minn. Stat. § 544.42, subd. 1(1). In enacting Minn. Stat. § 544.42, the Legislature eliminated the “harsh result” that existed under § 145.682 by its enactment of § 544.42’s subdivision 6(c) safe harbor provision. With the addition of such a safe harbor provision the “doctrine that the statute

‘cuts with a sharp but clean edge’ has been recently sheathed by the legislature for all future actions.” Teffeteller v. University of Minnesota, 645 N.W.2d 420, 436 n. 1 (Minn. 2002) (Gilbert, J. concurring in part, dissenting in part).<sup>5</sup>

The Legislature, by its enactment of Minn. Stat. § 544.42, subd. 6(c), mandates that the claimant be given notice by the trial court of any deficiencies in its expert identification and be provided with an opportunity to supplement his affidavit or interrogatories to correct any deficiencies. No longer is there this abrupt termination of an action when the expert identification is found insufficient. The preference for disposition of a claim on its merits has been reinstated.

**D. Plaintiffs Are Entitled to an Opportunity to Cure any Found Deficiencies.**

In ordering dismissal of Plaintiffs’ lawsuit, the trial court failed to apply Minn. Stat. § 544.42, subd. 6(c) as written. Plaintiffs provided expert identification within 180 days of commencement of their action. Under the statute as written, the trial court was statutorily required if it found the disclosure to be legally insufficient to “issue specific findings as to the deficiencies” and give Plaintiffs “60 days to satisfy the disclosure requirements in subdivision 4.” As the Court of Appeals recognized, “Minn. Stat. § 544.42, subd. 6(c), requires the district court – irrespective of the nature or severity of

---

<sup>5</sup> Teffeteller was a medical malpractice case subject to Minn. Stat. § 145.682 before its amendment in 2002. In 2002 the Legislature added a safe harbor provision akin to that which exists in Minn. Stat. § 544.42 as originally enacted. See Minn. Stat. § 145.682, subd. 6(c) (2002).

the deficiency – to provide parties with an opportunity to cure any alleged deficiencies in the expert-identification affidavit or answers to interrogatories.” (A. 3.)

In granting review, this Court has asked “what is the minimum standard for an affidavit of expert identification sufficient to entitle the plaintiff to notice of deficiencies and an opportunity to cure under Minn. Stat. § 544.42, subd. 6.” In addressing the expert disclosures required under Minn. Stat. § 145.682, subd. 4, which did not at that time contain the subd. 6 safe harbor provision at issue in this case, this Court stated “the most important disclosure of the affidavit required by section 145.682, subdivision 4 (the second affidavit) is the identity of an expert who is willing to testify as the alleged negligence.” Sorenson, 457 N.W.2d at 191 (emphasis in the original). Given this Court’s declaration in Sorenson, if this Court were to impose a minimum standard it is that the identity of the expert or experts be disclosed within the 180 days either by affidavit or answers to interrogatories. If the affidavit or answer is claimed to be otherwise deficient, the defendant must so assert to the trial court. The trial court must make specific findings and grant plaintiff 60 days to cure.

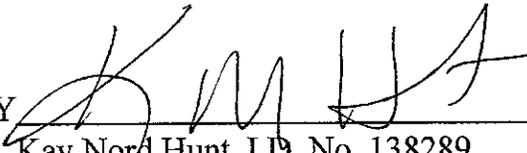
### CONCLUSION

Plaintiffs respectfully request that the trial court’s dismissal of their claims be reversed. Since there was no demand for an affidavit, the trial court’s ordered dismissal of all claims for failure to provide an affidavit of expert review must be reversed. As to the expert identification requirement, the experts were identified and the trial court’s dismissal must also be ordered reversed. The case should be remanded to the trial court

to make specific findings as to the expert identification deficiencies, if any, and to grant Plaintiffs 60 days to cure.

Dated: March 31, 2006

**LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.**

BY   
\_\_\_\_\_  
Kay Nord Hunt, I.D. No. 138289  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, Minnesota 55402  
(612) 339-8131

GEORGE E. ANTRIM, III, PLLC  
George E. Antrim, III, I.D. No. 120534  
201 Ridgewood Avenue  
Minneapolis, Minnesota 55403  
(612) 872-1313

**Attorneys for Petitioners**

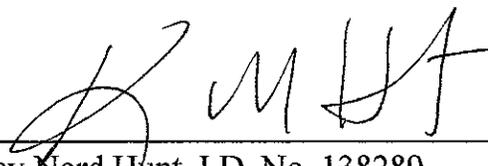
**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,390 words. This brief was prepared using Word Perfect 10.

Dated: March 31, 2006

**LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.**

BY



Kay Nord Hunt, I.D. No. 138289  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, Minnesota 55402  
(612) 339-8131

GEORGE E. ANTRIM, III, PLLC  
George E. Antrim, III, I.D. No. 120534  
201 Ridgewood Avenue  
Minneapolis, Minnesota 55403  
(612) 872-1313

**Attorneys for Petitioners**

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).