
State of Minnesota
In Court of Appeals

ROBERT MERCER,

Appellant,

vs.

STEVEN ANDERSEN, M.D., CORRECTIONAL MEDICAL SERVICES, INC.,
CONNIE RING, R.N., AND STATE OF MINNESOTA DEPARTMENT OF CORRECTIONS,

Respondents.

APPELLANT'S BRIEF AND APPENDIX

HANSEN, DORDELL, BRADT,
ODLAUG & BRADT
J. Mark Catron, Esq. (#15829)
Patrick W. Ostergren, Esq. (#326276)
3900 Northwoods Drive, Suite 250
Saint Paul, Minnesota 55112-6973
(651) 482-8900

Attorneys for Appellant

GERAGHTY, O'LOUGHLIN &
KENNEY, P.A.
Mark W. Hardy, Esq. (#0311121)
386 North Wabasha Street, Suite 1400
Saint Paul, Minnesota 55102
(651) 291-1177

Attorneys for Respondents
Correctional Medical Services, Inc.
and Steven Andersen, M.D.

P. KENNETH KOHNSTAMM, ESQ.
Attorney Registration No. 5740X
State of Minnesota
Department of Corrections
445 Minnesota Street, Suite 1100
Saint Paul, Minnesota 55101-2128
(651) 282-5829

Attorneys for Respondents
State of Minnesota
Department of Corrections

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STATEMENT OF THE ISSUES

1. Did the District Court err in concluding that the statute of limitations, pursuant to Minn. Stat. § 541.13 is not tolled where defendant had moved to Haiti and where plaintiffs' attempts at service were unsuccessful.

(Answer: Yes.)

The district court held that defendant's departure to Haiti was not sufficient to toll the statute of limitations pursuant to Minn. Stat. § 541.13.

- Minn. Stat. § 541.13
- *Long v. Moore*, 295 Minn. 266, 204 N.W.2d 641 (1973)
- *Duresky v. Hanson*, 329 N.W.2d 44 (Minn. 1983)

2. Did the District Court abuse its discretion in dismissing Dr. Steven Andersen, M.D., a non-served defendant, with prejudice, where plaintiff failed to serve him with a Summons & Complaint?

(Answer: Yes.)

The district court found that plaintiff had not served defendant within the applicable statute of limitations pursuant to Minn. Stat. § 541.13 and dismissed with prejudice.

- *Lewis v. Contracting Northwest, Inc.*, 413 N.W.2d (Minn. Ct. App. 1987)

3. Did the District Court err in dismissing plaintiff's claims for permanent injury where plaintiff did provide an expert affidavit in compliance with Minn. Stat. § 145.682, which showed that the plaintiff sustained an injury as a result of defendants' negligence but not provide an opinion with regard to the permanency of that injury.

(Answer: Yes.)

The district court held that plaintiff's affidavit, pursuant to Minn. Stat. § 145.682, Subd. 4, was deficient because, though undisputedly providing an opinion that the plaintiff sustained an injury, the affidavit did not provide an opinion that the injury was permanent.

- Minn. Stat. § 145.682, subd. 4
- *Tousignant v. St. Louis County*, 615 N.W.2d 53 (Minn. 2000)

4. Did the District Court abuse its discretion in determining that the plaintiff failed to establish excusable neglect, thereby providing for an extension of the statutory period within which to provide an expert affidavit regarding permanency, pursuant to Minn. Stat. § 145.682, Subd. 4, because of plaintiff's incarceration at a Minnesota correctional facility.

(Answer: Yes.)

The district court denied plaintiff's motion for an extension of the statutory and court ordered deadlines for disclosure of the opinions required under Minn. Stat. § 145.682, Subd. 4, finding that plaintiff had not met his burden to establish excusable neglect.

- Minn. Stat. § 145.682, subd. 6(C)(2)
- *Maudsley v. Pederson*, 676 N.W.2d 8, 12 (Minn. Ct. App. 2004)
- *Parker v. O'Phelan*, 414 N.W.2d 534 (Minn. Ct. App. 1987)
- *Tousignant v. St Louis County*, 615 N.W.2d 53 (Minn. 2000)

STATEMENT OF THE CASE

This is a medical negligence action brought by a Plaintiff Robert Mercer, (hereinafter "Mercer"), a former inmate at Minnesota Correctional Facility – Moose Lake. Mercer was incarcerated at Moose Lake, when on May 30, 2000, he presented to Steven Andersen, M.D., (hereinafter "Andersen") with dry skin over his eyes, elbows and knees. Andersen mistakenly prescribed, and defendant nurse administered ultraviolet (UV) light treatment, which vastly exceeded the accepted and recommended amount. As a result, Mercer sustained severe burns and permanent injuries to his eyes and skin.

Service of Process and Statute of Limitations:

On March 25, 2004, Mercer served Correctional Medical Services, Inc. (hereinafter "CMS") with his Summons and Complaint. CMS contracted with the Minnesota Department of Corrections (hereinafter "DOC") to provide medical services to Minnesota correctional facilities. The Summons and Complaint alleged battery and imputed liability for the actions of one of its employees, Andersen, for deviating from the applicable standard of care in negligently prescribing excessive amounts of ultraviolet treatment. Mercer also served Connie Ring, R.N. and the DOC, her employer.

In March 2004, plaintiff attempted to serve Andersen, individually, by various means, including personally serving him at his last known address and by publication. Plaintiff later learned that Andersen had left the state and moved to Haiti.

On July 9, 2004, Andersen served Mercer with a motion to dismiss for insufficiency of service of process. Mercer responded that, because of Andersen's departure from the state, the statute of limitations, pursuant to Minn. Stat. § 541.13 was

tolled while Andersen resided outside the state. Mercer argued that the district court was without jurisdiction to determine whether dismissal with prejudice was appropriate because it did not have jurisdiction over Andersen, as he had not been made a party by service of process.

The district court, by Order dated August 25, 2004, granted Andersen's motion to dismiss with prejudice.

Expert Affidavit Pursuant to Minn. Stat. § 145.682, subd. 4:

Minn. Stat. § 145.682, subd. 4, requires plaintiff to supply an affidavit from a qualified expert to support the claim that defendants' medical treatment failed to comply with the standards of care. Mercer did serve and file the Affidavit of Alan S. Boyd, M.D., which explained the defendants' deviation from the standard of care and identified that as the cause of injury to plaintiff. Nevertheless, defendant CMS and Connie Ring, R.N., moved the District Court for an Order dismissing plaintiff's claims of permanent injury because, though Dr. Boyd's Affidavit makes clear that Mercer sustained an injury, it does not provide an opinion regarding permanency. The district court granted defendants' motion by Order dated February 15, 2005.

The parties jointly requested that the district court enter final judgment on both its August 25, 2004 and February 15, 2005 Orders. This appeal followed.

STATEMENT OF FACTS

Injury and Treatment:

In May 2000, Mercer was an inmate at the Minnesota Correctional Facility in Moose Lake. The DOC controlled selection of Mercer's medical providers by

contracting with CMS (A-1 – A-16) and hiring its own nurses. On May 30, CMS's physician, Steven Andersen, M.D., diagnosed Mercer with psoriasis and prescribed ultraviolet treatments three times a week, 20 minutes per time, for 6 months. (A-17 – A-18).

The next day, the nurse in the prison infirmary gave Mercer a key to operate the UV light machine and directed Mercer to **self-administer**. (A-19 – A-38, pages 29 - 37). She had never used or been instructed on the use of the machine that Mercer used. (Id. at pages 39 - 45). She had never seen instructions or the manual for its use. (Id. at page 40) In fact, she had never before used a UV light machine in her career. (Id. at page 41). Mercer then stood in front of the UV machine for 15 minutes.

He suffered burns over most of his body. He reported to health services the next day complaining of severe burn, eye pain and dizziness. (A-39 – A-40). Upon exam he was assessed with first-degree burns over his entire body with reddened and profusely watering eyes. (Id.).

On June 2, Mercer complained to the doctor of blurred vision and a white haze in front of his eyes. (Id.). He was unable to perform a visual acuity test because he was not able to keep his eyes open. (Id.). He had vomited three times the day before and was having trouble sleeping because he was shivering and in pain. (Id.). He was noted to have first degree burns from head to toe. (Id.). On June 8, 2000 Mercer complained to Andersen of significant photosensitivity, pain and peeling blisters. (A-41). Andersen diagnosed ultraviolet burns to skin and keratitis of both eyes. (Id.). Staff optometrist

Michelle Taylor referred Mercer to Kevin Treacy, M.D. for an outside ophthalmology consultation to evaluate for corneal or macular burns. (A-42 – A-43).

Mercer has continued to seek treatment from the defendants and their doctors and nurses ever since his injury and right up until his recent discharge from DOC custody. The records reflect defendants' full awareness of plaintiff's ongoing problems for over four years since his injury. In June of 2000, the doctors' notes describe his blisters, ongoing pain, blurred vision and photophobia. (A-44 – A-47). In 2001, the doctor recorded visual deficiencies and his ongoing complaints of blurred vision and ocular discomfort. (A-42 – A-43). The doctor diagnosed epithelial keratitis from ultraviolet exposure and prescribed eyedrops, sunglasses and UV protection.

By December 2001, Dr. Kluge at DOC – Fairbault noted continuing eye irritation and redness, as well as skin lesions. (A-48 – A-49). In May and August 2002, he assessed Mercer's sensitivity to UV and fluorescent light and affirmed he needed medications and protection from light. (A-50 – A-52). By June 2004, Mercer was housed at DOC – Red Wing, where the doctor referred him to outside specialists. (A-53 – A-54). Doctors recommended that he continue to avoid exposure to sunlight and continue his regimen of eye therapy. (A-55 – A-59).

At all times throughout plaintiff's incarceration and until his release in July 2005, defendant DOC, through its doctors and nurses, has controlled and directed the plaintiff's medical treatment, retained his records and made referrals. Mercer has been released from incarceration as of July 2005 and is serving the remainder of his sentence under a work release program.

Service of Process and Statute of Limitations:

This case was commenced by service of the Summons and Complaint on defendants CMS and Connie Ring, R.N., on or about March 25, 2004. (A-60 – A-65). On March 19, 2004, Mercer first attempted to serve Andersen by mailing a copy of the Summons and Complaint to defendant's attorney, Robert Mahoney. Attached to the Complaint was Affidavit of Counsel Pursuant to Minn. Stat. § 145.682. Defendant's attorney did not accept service on behalf his client (A-66) though acknowledging that his office represented Andersen in previous correspondence. (A-67).

Next, on March 22, 2004 Mercer attempted to serve Andersen with the Summons and Complaint by personally serving him at his last known address at Moose Lake. The Return of Service indicated that the deputy was unable to locate Andersen (A-68 – A-69). Plaintiff then sent, by Certified U.S. Mail, a copy of the Summons and Complaint to Andersen at West Palm Beach, Florida, at a subsequent address. Contemporaneously, he served the Minnesota Commissioner of Commerce, pursuant to Minn. Stat. § 45.028. (A-70 – A-71).

Finally, on May 13, 20 and 27, 2004, the Summons was published in the Saint Paul Legal Ledger. (A-72 – A-74). Notice of the publication was mailed to defendant's last known address on May 20, 2004 (Id.) and the Affidavit of Publication was mailed to defendant's last known address on June 3, 2004. (Id.).

Andersen's attorney has never disclosed his address, and Mercer still does not know where he is.

On July 9, 2004, Andersen served Mercer with a motion to dismiss, with prejudice, for insufficiency of service of process. (A-75 – A-86). Mercer conceded that he had failed to properly serve Andersen with the Summons and Complaint, arguing, therefore, that the District Court was without jurisdiction to dismiss Andersen, with prejudice, as he had not been made a party to the action. (A-87 – A-99). Alternatively, Mercer argued that Andersen’s departure from the state tolled the statute of limitations pursuant to Minn. Stat. § 541.13. (Id.).

By Order dated August 25, 2004, the District Court dismissed the claims against Andersen, with prejudice. (A-100 – A-104).

Expert Affidavit, Minn. Stat. § 145.682:

Plaintiff served the affidavit required by Minn. Stat. § 145.682, subd. 4, on August 31, 2004. (A-105 – A-107). The affiant, Dr. Alan Boyd, is a Board-certified dermatologist who treats psoriasis patients and utilizes UV light therapy. (Id.). He states clearly that, having reviewed the records, the doctor and the nursing staff departed from the standard of care, and the departure “was a direct cause of Robert Mercer’s second degree burns.” (Id.).

Pursuant to the Court’s Scheduling Order, all discovery was to be completed by January 1, 2005 and experts disclosed by December 1, 2004. (A-108 – A-109). Mercer disclosed the opinions of Dr. Boyd within the Court’s schedule. Defendants did not disclose expert opinions.

On December 17, 2004, three months after the statutory deadline to provide expert opinions had passed, Defendants served a motion for partial summary judgment,

challenging the sufficiency of Dr. Boyd's Affidavit. (A-110 – A-153). The defendants did not object to the expert's qualifications or his opinions on negligence, standard of care or medical causation. (Id.). Rather, the defendants alleged that the Affidavit lacked an opinion about the "permanency" of Mercer's injuries. (Id.).

In response to defendants' motions, Mercer noted that Minn. Stat. § 145.682 does *not* require an opinion as to the extent of injury, i.e. permanency. (A-154 – A-195). Rather, the statute only requires an opinion that the defendant deviated from the acceptable standard of care and that the deviation is the cause of injury. (Id.). Alternatively, Mercer moved the District Court for an order extending the deadline of Minn. Stat. § 145.682, subd. 4, because of excusable neglect based on Mercer's inability to provide an affidavit regarding permanency because of his incarceration. (Id.).

According to DOC Directive 500.135, inmates are not free to seek treatment or medical evaluation at will outside the facility. (A-196 – A198). They must follow certain procedures in order to be considered for outside medical care, and DOC employees have discretion to approve requests.*

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- * A. An offender requesting to be seen by a private health care provider must initiate a request for the approval process by sending a written request to his/her case manager.
- B. The security status of the offender will be taken into account prior to approval.
- C. The case manager will give the offender an *Agreement to Pay for Outside Private Health Care* and *Letter to Private Health Care Provider*.
- D. The offender must complete the Agreement and return it to his/her case manager and must complete the letter and send it to the health care provider.
- E. Upon receipt of both completed forms, the Health Services Administrator or Psychological Services Director will verify the health care provider's license through the appropriate state credentialing board.

(Footnote continued on the next page)

Dr. Rustad, a physician whom Mercer saw on referral from DOC doctors, recommended that he undergo photo-patch testing at the Mayo Clinic. (A-199 – A-201) According to Dr. Rustad this is the only test which can detect whether Mercer’s identified skin problems are the result of UV radiation exposure or something else, as defendants seem to allege. However, Dr. Rustad has refused to provide a referral as, according to Dr. Rustad, that should come from Mercer’s treating physician. (Id.). Since 1998, Mercer’s treating physicians have been the physicians of defendants CMS and DOC who have thus far not provided Mercer with that referral. (Id.).

Upon notice of defendants’ claim that Dr. Boyd’s Affidavit was defective, counsel for Mercer contacted counsel for defendants requesting that they stipulate to an extension of the Court’s Scheduling Order and the requirements of Minn. Stat. § 145.682, subd. 4 (A-202 – A-205). Mercer’s attorney indicated that Mercer had not been examined by a

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- F The case manager will complete the *Memorandum to the Warden/Superintendent for Offender Requested Private Health Care* and forwarded the memorandum, Agreement and Letter to the Health Care Provider to the warden/superintendent for approval routing as indicated on the memorandum.
 - G. If the warden/superintendent approves the evaluation, he/she will forward it for further action.
 - H The case manager will ensure that the offender has completed a voucher for the costs incurred with the appointment to the private health care provider. Financial resources must be available prior to the appointment being made.
 - I. Upon approval from the warden/superintendent, the case manager will work with the Health Services Administrator/designee or Psychological Services Director to arrange an appointment date and time.
 - J. Health Services staff will notify the facility transportation unit to arrange the special duty.
 - K. The case manager will notify the offender of the appointment approval.
 - L. The facility transportation staff and other necessary security staff will transport the offender to the scheduled appointment.
 - M The offender may request and pay for any records that need to accompany him/her to the appointment.
(A-196 – A-198)

physician of counsel's choice, nor had he been seen at the Mayo Clinic for the photo-patch testing he sought. (Id.). Counsel requested that Mercer be allowed to seek a medical opinion before the 45-day period to cure had expired. (Id.). Counsel for DOC informed Mercer's counsel that he might be able to expedite such a process. (Id.). Not until January 18, 2005, 15 days before the February hearing of this matter, did Counsel for Mercer receive a further response from counsel for the DOC. (Id.). The response did not address Mercer's request to be seen by a physician of his choice and without cost, prior to the hearing, nor what aspect of such a request counsel could expedite. (Id.). The response simply directed the undersigned to a website wherein Division Directive 500.135 could be found. (Id.).

The District Court, by Order of February 15, 2005, dismissed Mercer's claim for permanent injury and denied his motion to extend the timing requirements of Minn. Stat. § 145.682, subd. 4. (A-206 – A-213).

LEGAL ARGUMENT

I. STANDARD OF REVIEW

a. Statute of Limitations:

The District Court's decision determining that the statute of limitations was not tolled pursuant to Minn. Stat. § 541.13 is reviewed de novo. The construction of a statute of limitations is a question of law, reviewed de novo. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998). A reviewing court is not bound and need not give deference to a district court's decision on a purely legal issue. *Modrow v. JP Foodservice, Inc.* 656 N.W.2d 389, 393 (Minn. 2003). Hence the critical inquiry is

whether the District Court erred in its determination that Minn. Stat. § 541.13 was not tolled by Andersen's flight from Minnesota.

b. Service of Process on Andersen:

Mercer does not claim he succeeded in serving Andersen. Thus, although named in the Complaint, he has never been a party effectively joined in this case. Thus, the issue is whether the court has ever had jurisdiction to make his dismissal "with prejudice".

Though determination of whether service of process was proper is a question of law, there is no dispute in the present case that service was not proper. *Turek v. A.S.P. of Moorhead, Inc.*, 618 N.W.2d 609, 611 (Minn. Ct. App. 2000), *rev. denied*. The critical inquiry for this Court is whether the District Court abused its discretion in dismissing Andersen, *with prejudice*. 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 Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990).

c. Expert Affidavits:

There is no dispute that Mercer has provided an affidavit sufficient to demonstrate defendants' negligence, plaintiff's injury, and causation. Likewise, there is no dispute that Mercer has a claim for battery – a claim that survives despite the District Court's Order dismissing Mercer's claim for permanent injury. Hence, the issue is whether Minn. Stat. § 145.682, subd. 4, requires that Mercer provide an opinion regarding the extent or permanency of his injuries, and whether the Court erred in dismissing Mercer's claim for permanent injury.

When the District Court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, reviewed de novo by the appellate court. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998). A reviewing court need not defer to the district court's application of the law when the material facts are not in dispute. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989).

d. Excusable Neglect:

In the event that this Court determines that the District Court did not err in interpreting the statute, the issue for the Court is whether Mercer has established "excusable neglect" for failing to provide a sufficient affidavit.

The claim of excusable neglect required the District Court to make a factual finding and apply those findings to statutory criteria.

"Particularly in cases of this kind, where the trial court is weighing statutory criteria in light of the found basic facts, the trial court's conclusions of law will include determination of mixed questions of law and fact, determination of ultimate facts, and legal conclusions. In such a blend, the appellate court may correct erroneous applications of the law. As to the trial court's conclusions on the ultimate issues, mindful of the discretion accorded the trial court in the exercise of its equitable jurisdiction, the reviewing court reviews under an abuse of discretion standard."

Maxfield v. Maxfield, 452 N.W.2d 219, 221 (Minn. 1990).

II. STATUTE OF LIMITATIONS

The District Court's August 25, 2004 Order dismissing Andersen with prejudice held that Mercer had not met his burden in establishing that he could not find Andersen after a diligent search. Furthermore, the Court concluded that Andersen must be

dismissed with prejudice so that Mercer would be unable to further attempt to serve Andersen should he be located.

Minn. Stat. § 541.13. provides:

When a cause of action accrues against a person who is out of state and while out of state is not subject to process under the laws of this state or after diligent search the person cannot be found for the purpose of personal service when personal service is required, an action may be commenced within the times herein limited after the person's return to the state; *and if, after a cause of action accrues, the person departs the from state and resides out of the state and while out of the state is not subject to process under the laws of this state or after a diligent search the person cannot be found for the purpose of personal service when personal service is required, the time of the person's absence is not part of the time limited for the commencement of the action.*

(Emphasis added.)

The statute preserves claims by preventing the statute of limitations from running while personal service is impossible. *Long v. Moore*, 295 Minn. 266, 270, 204 N.W.2d 641, 643 (1973).

a. Defendant departed from, and resides out of the state.

Defendant apparently does not dispute Andersen has departed from Minnesota. If he attempts to dispute the nature and duration of his residence out of the state he will only create a fact question. *Duresky v. Hanson*, 329 N.W.2d 44, 48 (Minn. 1983). Clearly, the facts requisite to the application of the tolling statute exist, to wit, that Andersen has departed the state with no plans on returning.

b. Defendant is not subject to process under the laws of this state.

According to defendant's attorney, defendant is living somewhere in Haiti. Haiti is not a member of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, and hence, personal service is not possible.

Mercer concedes that the technical requirements of the service by publication Rule were not met when he attempted to so serve Andersen. However, because, at the time of Andersen's motion to dismiss the statute of limitations had not run, Mercer retained the option to reserve defendant.*

c. After a diligent search the person cannot be found.

Mercer's attempts to locate defendant have taken him from Moose Lake, where defendant last worked; to Saint Paul, the location of his attorney; on to West Palm Beach Florida, defendant's last known address in the United States. Mercer has not conducted a search in Haiti, however, even Andersen's lawyer apparently does not know where to find his client.

The Supreme Court in *Duresky* expressed a desire to avoid an "inequitable result" by liberal application of the "diligent search" reference:

[w]e conclude that the 6-year statute of limitations should be tolled for any period of time that a defendant is absent from the state until plaintiff discovers the location of the defendant or knowledge of facts establishing the availability of substituted service under section 170.55, whichever occurs first, unless the plaintiff has made no attempt to make a "diligent search" before the general statute of limitations would have expired without tolling.

* The real curiosity in this situation is this: why did the court feel compelled to *forever* bar plaintiff's claim against Andersen when it most certainly did not have to reach this issue? Simple dismissal without prejudice would have put the burden back on the plaintiff to achieve proper service, which he could have accomplished (and can still).

Duresky v. Hanson, 329 N.W.2d 44, 48 (Minn. 1983)

In any event, the issue of diligence is for the trier of fact. (*Ibid.*) The District Court could have held that, at most, Mercer's search, having led to Haiti, has lifted the tolling period. There simply cannot be an expectation that Mercer do more to find Andersen in Haiti prior to having garnered the knowledge that Andersen resided there.

III. SERVICE OF PROCESS:

The District Court did not have jurisdiction to dismiss Andersen prospectively, based upon future service of process, as he was not a party to this action. The most the District Court should have done is to dismiss the action against Andersen without prejudice.

Because dismissal for lack of personal jurisdiction is less than an adjudication on the merits, a court dismissing a case for want of personal jurisdiction has no authority to decide any other issues in the case, i.e. to dismiss a case with prejudice, to decide issues of whether the statute of limitations has run, to decide issues of diligent search, or any other issues raised in the case. *Lewis v. Contracting Northwest, Inc.*, 413 N.W.2d (Minn. Ct. App. 1987): **"The proper action to be taken by the court, if it finds insufficient service of process, is to dismiss the action without prejudice."** (*Id.* at 155-156.) *Lewis* notes, [a] motion to dismiss contests that plaintiff has complied with the procedural requirements for the exercise of [the court's] power to exercise jurisdiction. *Id.* at 155, 156.

The court does not have the power to assert jurisdiction or to rule on substantive issues if plaintiff has failed to serve the summons and complaint.

IV. EXPERT AFFIDAVIT PURSUANT TO MINN. STAT. § 145.682, SUBD. 4:

The District Court's February 15, 2005 Order held that Mercer had failed to meet his burden to provide a sufficient affidavit of expert review pursuant to Minn. Stat. 145.682, subd. 4, thereby dismissing claims of permanent injury. *

The statute requires expert support "with respect to the issues of malpractice and causation." The statute most certainly does not require that the plaintiff provide an opinion as to the long-term implications of the injury. Dr. Boyd's Affidavit does establish malpractice causing serious burns. Furthermore, Mercer's medical records, detailing four years of treatment by DOC physicians, indicate that Mercer continues to suffer, at a minimum, long-term effects of his injuries.

If Dr. Boyd's Affidavit is ruled deficient, Minn. Stat. § 145.682, subd. 6, provides for an extension of the deadline for good cause in the form of excusable neglect. Minn. Stat. § 145.682, subd. 6. Mercer has not been in a position to seek outside medical opinions from physicians of his choice at will, and he made a timely request for extension of the time within which to do so.

a. Minn. Stat. § 145.682, subd. 4:

The Legislature established Minn. Stat. § 145.682 as a filter to preclude non-meritorious claim. It does not require, and it was never meant to require plaintiffs to disclose every medical opinion applicable to a case, or even final medical opinions. Expert opinion is required because malpractice can be a complex issue:

* The trial court has created an anomalous and odd result. Plaintiff's Complaint asserts both medical negligence and battery causes of action. Battery requires no affidavit at all, and plaintiff certainly retained the right to claim permanent injury as a result. But the medical negligence count apparently cannot now support permanent injury claims.

We have stated that expert testimony is generally required to establish the standard of care and the departure from that standard for the conduct of physicians. *The purpose of expert testimony is to interpret the facts and connect the facts to conduct which constitutes [medical] malpractice and causation. This is based on the assumption that most medical malpractice cases involve complex issues of science or technology, requiring expert testimony to assist the jury in determining liability.*

Tousignant v. St. Louis County, 615 N.W.2d 53, 58 (Minn. 2000) (emphasis added).

The statute requires an affidavit simply related “to the issues of malpractice or causation”. Minn. Stat. § 145.682, subd. 4. The statute provides, “[n]othing in this subdivision may be construed to prevent either party from calling additional expert witnesses or substituting other expert witnesses.” Minn. Stat. § 145.682, subd. 4. Plaintiffs are therefore not limited in their proof either to the claims or opinions in the initial affidavit or to the expert who signs it. The effort by these defendants to dismiss claims for injuries that are not fully and finally described in the affidavit exceeds the terms of the statute.

The statute does not require an affidavit regarding the extent, permanency, seriousness, diagnoses or effects of the injury. The affidavit pertains only to the breach of the standard of care and the chain of medical causation resulting in damage. *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 193 (1990); see also *Stroud v. Hennepin County Medical Ctr.*, 556 N.W.2d 552, (Minn. 1996); *Lindberg v. Health Partners*, 599 N.W.2d 572, (Minn. 1999); *Anderson v. Rengachary*, 608 N.W.2d 843 (Minn. 2000); *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420 (Minn. 2002); *Maudsley v. Pederson*, 676 N.W.2d 8, (Minn. Ct. App. 2004). The required affidavit pertains only “to the issues of

malpractice or causation,” and it would require extreme contortion of that language to read it otherwise.

In *Tousignant*, the Minnesota Supreme Court overturned the trial court’s dismissal of plaintiff’s claim under Minn. Stat. § 145.682, subd. 4, finding that expert testimony was not necessary to establish plaintiff’s broken hip injury. (*Id.* at 60.) Home health staff failed to follow inter-agency instructions to keep the plaintiff restrained.

Tousignant proceeded to a jury without expert testimony to establish whether Tousignant’s hip fracture was a *permanent injury*. Numerous other cases have, without affidavits, all, presumably, allowed claims for permanent injury to proceed to trial. *Atwater Creamery v. Western Nat’l Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn. 1985); *Miller v. Raaen*, 273 Minn. 109, 114, 139 N.W.2d 877, 880 (1966); *Swanson v. Chatterton*, 281 Minn. 129, 160 N.W.2d 662 (1968); *Fowler v. Scheldup*, 166 Minn. 164, 207 N.W.2d 177 (1926); *Jensen v. Linner*, 260 Minn. 22, 108 N.W.2d 705 (1961); *Hestbeck v. Hennepin County*, 297 Minn. 419, 212 N.W.2d 361 (1973).

b. Scheduling Order:

A Scheduling Order, pursuant to Minn. R. Civ. P. 16.02 may be modified by leave of court for a showing of good cause. Whether or not to enforce its own scheduling order is clearly within the district court’s discretion. *Maudsley v. Pederson*, 676 N.W.2d 8, 12 (Minn. Ct. App. 2004). Mercer has not been free to seek the medical opinions he needs to move his case along. Nothing in Minn. Stat. § 145.682 prevents the District Court from modifying its scheduling order. *Id.* To the contrary, the statute clearly contemplates that the court may “provide for extensions of the time limits... .” In all

fairness, all Mercer seeks is time and opportunity to be evaluated by doctors of his own choice. That opportunity does not prejudice the defendants. He can be evaluated after his work release this summer, and the case can be trial-ready upon his discharge next fall.

V. MERCER HAS ESTABLISHED EXCUSABLE NEGLIGENCE

a. "Time to Cure"

Pursuant to Minn. Stat. § 145.682, subd. 6(C)(2), Mercer had 45 days to cure any deficiencies in his expert affidavit. Minn. Stat. § 145.682, subd. 6(C)(2); *Maudsley v. Pederson*, 676 N.W.2d 8, 12 (Minn. Ct. App. 2004), note 1. Unfortunately, he did not have the ability to cure the affidavit as he did not have the opportunity to seek out a medical opinion prior to the motion hearing date.

An extension of time to fulfill the requirements of Minn. Stat. § 145.682 is proper if the party seeking the extension has a reasonable excuse for failing to comply. *Tousignant v. St. Louis County*, 602 N.W.2d 882, 887 (Minn. Ct. App. 1999), *rev'd on other grounds*. Minnesota courts have established the factors for determining "excusable neglect". *Parker v. O'Phelan*, 414 N.W.2d 534, (Minn. Ct. App. 1987); *Stern v. Dill*, 442 N.W.2d 322 (Minn. 1989); *Bellacourt v. U.S. et al.*, 784 F.Supp. 623 (D.Minn 1992); *aff'd*, 994 F.2d. 427 (8th Cir. 1993), *reh'g, en banc, denied, cert. den'd*, 510 U.S. 1109 (1994).

Under those cases, plaintiff may escape dismissal for noncompliance using two methods. First, the court may grant an extension of the time for serving the affidavits after the time limits have expired upon a showing of excusable neglect. *Stern v. Dill*, 442 N.W.2d 322 (Minn. 1989). In order to claim excusable neglect, a plaintiff must satisfy

four factors: (1) plaintiff has a reasonable case on the merits; (2) plaintiff has a reasonable excuse for his failure to meet the statutory time limits; (3) plaintiff has proceeded with due diligence after notice of statutory time limits; and (4) no prejudice will result to defendant by the extension.

b. Excusable Neglect:

1. Mercer has a reasonable case on the Merits.

Defendants do not challenge the sufficiency of Dr. Boyd's Affidavit as it relates to their negligence and their causation of Mercer's injuries.* Thus, although the District Court dismissed Mercer's claim for permanent injuries, a jury will still hear Mercer's claim for damages caused by defendants' negligence. Additionally, the jury will hear Mercer's claim for battery, a cause of action that does not require an expert affidavit. Plaintiff has made his prima facie case against all defendants. *Todd v. Eitel Hosp.*, 306 Minn. 254, 257, 237 N.W.2d 357, 359 (1975).

2. Mercer has a reasonable excuse for failing to meet the statutory time limits.

Mercer has a reasonable excuse for failing to meet the statutory time limits. Mercer had been incarcerated at all time material to this litigation. As such, he was severely limited in his access to medical care outside the correctional facility. Though Department of Corrections directives exist so that Mercer can seek outside medical care, the directives are arduous and time consuming, and they do not allow for medical evaluations for purposes of litigation.

* In fact, inasmuch as the defendants allowed the expert disclosure deadline to pass without naming experts or disclosing opinions, it appears negligence and causation are not in issue

3. Mercer has proceeded with due diligence after notice of the statutory time limits.

As noted above, Mercer requested photo-patch testing from the Mayo Clinic when notified of defendants' challenges to the Boyd Affidavit. Mercer also requested to be allowed to seek a medical opinion even before the 45-day period to cure had expired. Mercer was simply directed to the state's regulations. He specifically sought a referral and was denied that referral as the 45 days elapsed.

4. Defendants will not be prejudiced

Defendants will not be prejudiced in any way by this Court granting an extension within which Mercer may seek to cure deficiencies in Dr. Boyd's Affidavit. Defendants have known about Mercer's claim of permanent injury since being served with the Summons and Complaint. They controlled his care and his medical records. They have chosen not to have Mercer examined by a physician of their choice. They did not object to Dr. Boyd's Affidavit until more than three and a half months after receiving his disclosures. The policy behind Minn. Stat. §145.682 is to eliminate frivolous lawsuits, not to encourage defense game playing.

As noted in *Parker v. O'Phelan*:

The primary purpose of Minn. Stat. § 145.682 is to eliminate nuisance malpractice suits by establishing a process where affidavits of expert review are required to verify the lawsuit's validity. [Defendant physician] claims the grant of a time extension would effectively eliminate the legislative condition imposed for maintaining a medical malpractice action... . The policy behind the rules of civil procedure, however, is to try cases on the merits and seek determination of every action. The statutory purpose of eliminating nuisance claims is not harmed [by granting an extension] since the plaintiff still is required to submit the affidavit to the validity of the negligence claim.

Parker v. O'Phelan, 414 N.W.2d 534 (Minn. Ct. App. 1987).

The only prejudice in this matter has fallen on Mercer by his inability to be examined by a physician of his choice in order to cure his affidavit within the 45 days allowed by law.

CONCLUSION

The District Court clearly erred in dismissing Andersen from the case, with prejudice, when it concluded that the statute of limitations was not tolled by Andersen's flight from the state. Additionally, the District Court erred by concluding that the expert affidavit requirements of Minn. Stat. § 145.682, subd. 4, were not met and that Mercer had not established excusable neglect in failing to meet the requirements. For the above reasons, Mercer respectfully requests the Court reverse the District Court's August 25, 2004 and February 15, 2005 Orders dismissing Andersen and Mercer's claim for permanent injury.

Respectfully submitted,

Dated: _____

8/22/05

HANSEN, DORDELL, BRADT, ODLAUG
& BRADT, P.L.L.P.

By _____

J. Mark Catron, #15829

Patrick W. Ostergren, #326276

3900 Northwoods Drive, Suite 250

St. Paul, MN 55112-6973

Phone: 651/482-8900

Attorneys for Appellant

**CERTIFICATE OF COMPLIANCE
PURSUANT TO MINN. R. CIV. APP. P. 132.01, SUBD. 3**

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2000, which reports that the brief contains 5,247 words.



J. Mark Catron

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).