

CASE NO. A05-1103

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 REPLY BRIEF

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
Hansen, Dordell, Bradt,
Odlaug & Bradt

STATE OF MINNESOTA
P. Kenneth Kohnstamm, Esq. (#5740X)
445 Minnesota Street
Suite 1100
Saint Paul, Minnesota 55101-2128
(651) 282-5829

Attorneys for Respondents
State of Minnesota
Department of Corrections

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.

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LEGAL ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DISMISSED APPELLANT'S CLAIMS AGAINST ANDERSEN WITH PREJUDICE AFTER APPELLANT'S FAILURE TO ADEQUATELY SERVE DR. ANDERSEN.

A. The District Court Erred by Deciding the Statute of Limitations Question When it was not Even in Issue.

Andersen relies on *Johnson v. Huseby*, 469 N.W.2d 742 (Min. Ct. App. 1991) to argue that district courts can determine limitations issues where service has not been completed. *Johnson* does not stand for such a proposition. In *Johnson*, defendant Huseby was served with process, though not effectively, within the period within which to do so. Whether Huseby had been served was an issue, and the court had jurisdiction to decide both the issue of proper service and whether the statute of limitations was tolled. In the present case, *service was not an issue before the Court*. Mercer conceded that he had not served Andersen, effectively eliminating that issue for the Court. Andersen was not a party and was without standing, the Court simply did not have the power or jurisdiction to dismiss him with prejudice.

Instead, *Lewis v. Contracting Northwest, Inc.*, is directly on point. The holding in *Lewis* is simple and sensible, to wit:

“Defects in service are jurisdictional in nature...If service on a certain date is improper,” (or not made at all) “then the court does not have jurisdiction as of that date...court[s] cannot appropriate to itself jurisdiction which the law does not give.”

Lewis v. Contracting Northwest, Inc., 413 N.W.2d 154, 157 (Minn. Ct. App. 1987).

Andersen next urges that “judicial economy” required the Court to rule on the statute of limitations issue because, implicit in Mercer’s arguments before the district

Court, were his intentions to serve Andersen properly. When did “judicial economy” achieve such a preferred status in the law to assert personal jurisdiction where it does not exist in order to cut off a plaintiff’s continuing efforts to serve a defendant? It was Mercer’s right to try to serve Andersen as many times as it takes to get it right. There is no rule, statute or law that impairs or limits that right. By Andersen’s logic, he should have been dismissed after Mercer’s first service failure so that he and the court could have been spared any inconvenience.

The fact of the matter remains: Mercer has not yet served Andersen; he has a right to serve Andersen; the Court does not have jurisdiction over Andersen (or the limitations issue) until he is served. Andersen is not a party and does not have to defend or respond to Mercer until he is.

B. The District Court Erred in Holding that the Statute of Limitations Was Not Tolloed Pursuant to Minn. Stat. § 541.13.

It continues to be the single greatest irony in this case that Andersen’s attorney denied knowing his own client’s whereabouts while at the same time criticizing Mercer’s efforts to locate him.

Mercer’s Memorandum details the numerous efforts made in attempting to locate and serve Anderson.

Anderson relies now on “Google” to show those efforts were inadequate. But even the “Google” search that counsel describes takes the searcher only to a web site with a picture of Andersen, an address in North Carolina and nothing more. It does not provide an address in Haiti. Only after Anderson’s attorney revealed a clinic name and narrowed

Mercer's search to "southern Haiti" on July 9, 2004, did Mercer have any useful information. Mercer had no way to serve a person in Haiti short of retaining a process server to search *all of Haiti*, which would have been required according to counsel for Andersen. Even after July 9, 2004, that process server would have only narrowed his or her search by half a country.

Mercer attempted to serve Andersen by and through his attorney, his last known address in Minnesota, his last known address in the United States and by publication. His failure to search the entire country of Haiti should not as a matter of law defeat his claim. At a minimum, Mercer's search creates a fact question as to whether his search was diligent.

II. THE DISTRICT COURT ERRED IN DISMISSING MERCER'S CLAIMS FOR DAMAGES FOR LONG-TERM AND PERMANENT INJURIES

Respondents exhaust over 20 pages of argument complaining about insufficiencies of Mercer's expert affidavit. They largely miss the mark: the only issue before the Court is whether the statute requires an expert affidavit to include a separate opinion specifying the duration or permanency of injuries caused by defendant's malpractice. As Mercer's Memorandum demonstrates, no such requirement exists under the law.

Much of respondents' arguments are spent tracing the development, through case law, of the filtering mechanism that is Minn. Stat. § 145.682. What respondents fail to do, however, is provide any basis for the Court to conclude that Mercer has not met his burden under the statute. There is no dispute that he has met his burden with regard to

injury resulting from defendants' negligence under his pled theories of medical negligence¹.

Respondents argue that *Tousignant* is not on point because Mercer's damages involve "complex scientific issues" that a layperson could not comprehend. *Tousignant v. St. Louis County*, 615 N.W.2d 53 (Minn. 2000). There is no reason to believe that a hip injury is any less complex than a burn. Respondent CMS argues that, unlike *Tousignant*, Mercer's injury is so complex that it requires expert testimony to establish whether or not overexposure to UV light can cause long-term and/or permanent damages, photosensitivity etc.

Tousignant remains on point. In that case, there was no causation opinion necessary to establish the extent of *Tousignant*'s injuries. *Id.* at 60. Under CMS' logic, even though causation was not an issue before the jury, the jury would not be able to understand the complexities of the damages: whether *Tousignant* would walk again; what was the extent of her neurological deficiencies; *did the fracture cause long-term or permanent injury?*

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD THAT MERCER HAD ESTABLISHED EXCUSABLE NEGLIGENCE

A. Mercer has a Reasonable Case on the Merits.

Respondents claim that Mercer does not have a reasonable case on the merits. However, it is undisputed that Mercer has a reasonable claim as his claim for medical negligence (for short-term injuries) and battery are set for trial where a jury will

¹ Respondents do not argue for dismissal of appellant's separate battery claim, or of the claim for lasting and permanent injuries resulting from the battery

determine the extent of Mercer's damages. There is no requirement that Mercer demonstrate more than a prima facie case for negligence; battery and damages. Nor is there any requirement that Mercer demonstrate a reasonable case on the merits with regard to the disputed injury, i.e. permanency. Reasonable does not mean free from doubt or challenge

B. Mercer Has Established a Reasonable Excuse for Failing to Meet the Statutory Time Limits.

Respondents argue that *Broehm* is controlling with regard to whether Mercer has established a reasonable excuse for failing to meet the statutory time limits. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 728 (Minn. 2005). Mercer was incarcerated. He did not have access to the same medial providers and opportunities for expert review as Broehm. Broehm did not claim any impediments to obtaining an affidavit of expert review. Rather, she claimed she was waiting for Mayo to provide causation opinions - presumably waiting to see what the affidavit needed to say.

Mercer, on the other hand, was only made aware of the alleged deficiency of his affidavit December 17, 2004. Respondent CMS claims that a conversation between counsel for CMS and counsel for Mercer prior to the serving of CMS' motion to dismiss has some legal effect. Minn. Stat. § 145.682 specifically begins the running the 45-day time to cure at the "date of service of the motion". Minn. Stat. § 145.682, subd. 6 (c) (2).

Between that date and the date of the hearing on respondent's motion to dismiss, Mercer was expected to: get an appointment with a CMS physician; obtain a referral from the CMS physician for photo patch testing; have the warden approve the referral; make

the appointment; come up with the money for the appointment; the guard and transportation; undergo the testing and receive the results; and then find a physician to review the report and draft an affidavit – all while under the custody and control of respondent CMS.

Respondents argue that because Mercer sought care from outside medical providers in the past, he should have been able to do so within the confines of the 45-day curing period. What respondents fail to note, however, is that in both Mercer’s visit to Drs. Ketchum and Rustad, CMS physicians had to refer him. The fact of the matter remains that Mercer claims he requested a referral to the Mayo Clinic for photo-patch testing while incarcerated by respondents. He was never given that referral and he did not have the resources to pay for the appointment.

The transcript from the February 3, 2005 oral arguments detail that respondent Department of Corrections (“DOC”) was aware of Mercer’s request for the testing.² Counsel for DOC notes that he had spoken to Mercer’s case manager:

“Mercer had conversations with his case manager and he does not have the money, at this point, to pay for a Mayo Clinic visit, transportation and accompaniment by a guard. That’s the hang up right now.”

(February 3, 2005 Transcript of Oral Arguments at page 17).

For Mercer, his inability to pay for his appointment was more than a “hang up”. It meant the dismissal of his claim. At oral argument, respondent DOC acknowledged that Mercer was unable to seek the medical opinion he needed to satisfy the alleged deficiency. Mercer has, at a minimum, established a reasonable excuse.

² Mercer claims he filed a “kite” or a inter-prison request to see a respondent CMS physician. At that visit, Mercer intended to request the referral in addition to requesting the same from his case manager.

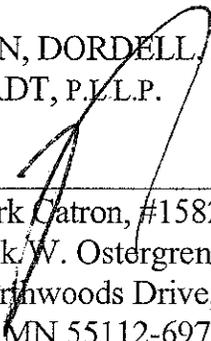
CONCLUSION

For the forgoing reasons, Mercer urges reversal of the District Court's orders dismissing Andersen with prejudice and Mercer's claims for permanent injuries.

Respectfully submitted,

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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