

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.

**BRIEF OF RESPONDENTS CONNIE RING, R.N.
AND STATE OF MINNESOTA DEPARTMENT OF CORRECTIONS**

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STATEMENT OF THE CASE AND FACTS

Appellant was an inmate in the Minnesota correctional system from February 1998 through July 2005 following his plea of guilty to a charge of second degree murder. On May 31, 2000, at the time of Appellant's alleged overexposure to ultra violet ("UV") light, he was an inmate at the correctional facility in Moose Lake and Connie Ring, R.N., was an employee of that facility. The Minnesota Department of Corrections and nurse Ring are referred to here as the "State Respondents."

Two issues are briefed by the State Respondents, namely, whether the trial court abused its discretion in finding that Appellant's affidavit of expert identification was legally inadequate and that Appellant failed to establish excusable neglect for that inadequacy. On these issues, the State Respondents have an identity of interest with Respondent Correctional Medical Services ("CMS"). Accordingly, the State Respondents adopt the statement of the case and the statement of the facts submitted by Respondent CMS.¹

¹ References to the record are to the Appellant's Appendix ("A.") and Respondent CMS' Appendix ("R.A.").

LEGAL ISSUES

- I. Whether the trial court abused its discretion in dismissing Appellant's damages claim for permanent injuries?

The trial court dismissed Appellant's claim.

Apposite Authority:

Broehm v. Mayo Clinic, 690 N.W.2d 721 (Minn. 2005)
Anderson v. Rengachary, 608 N.W.2d 843 (Minn. 2000)
Sorenson v. St. Paul Ramsey Med. Ctr., 457 N.W.2d 188 (Minn. 1990)
Minn. Stat. § 145.682

- II. Whether the trial court abused its discretion in denying Appellant an extension of time in which to obtain an expert affidavit?

The trial court denied the extension.

Apposite Authority:

Stern v. Dill, 442 N.W.2d 322 (Minn. 1989)
Parker v. O'Phelan, 414 N.W.2d 534 (Minn. Ct. App. 1987)
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ARGUMENT

I. STANDARD OF REVIEW.

When the trial court has dismissed for failure to comply with the expert review statute, this Court, “will reverse a district court’s dismissal of a suit pursuant to Minn. Stat. § 145.682 only if the district court abused its discretion.” *Anderson v. Rengachary*, 608 N.W.2d 843, 846 (Minn. 2000), citing *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990). In *Sorenson*, the Court also noted that motions to dismiss under the expert review statute are properly reviewed as a “statutory dismissal for procedural reasons and not a summary judgment.” *Id.* at 189 n.1.

The trial court declined to grant Appellant an extension of time in which to meet the requirements of the expert review statute. Minnesota Appellate Courts “review the denial of an extension of the disclosure deadline for an abuse of discretion.” *Broehm v. Mayo Clinic*, 690 N.W.2d 721, 727 (Minn. 2005), citing *Lindberg v. HealthPartners, Inc.*, 599 N.W.2d 572, 578-79 (Minn. 1999).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING APPELLANT’S CLAIM FOR PERMANENT INJURIES.

The partial dismissal of Appellant’s lawsuit is dictated by a statute that seeks to screen out insubstantial medical malpractice claims. We first review the rationale of the statute and then consider its application in this case.

A. Legislative History Of The Expert Review Statute.

The trial court granted motions for partial dismissal under the expert review statute, Minn. Stat. § 145.682. This statute was part of the Tort Reform Act of 1986.

Minn. Laws, 1986, ch. 455. The Act was a response to a perceived “liability crisis” and produced an act of nearly 100 provisions which were considered to be “tort reform.” The Act included statutes which made modifications to the State and Municipal Tort Claims Acts, made restrictions to punitive damage laws, amended bad faith attorney fee provisions, and provided for the deduction of collateral sources from verdicts. *Id.*

In the medical malpractice field, the Tort Reform Act of 1986 included provisions which expanded the waiver of medical privilege, shortened the tolling of statute of limitations for minors, and required, for the first time, certification of expert review.²

The certification of expert review statute was part of Minnesota’s attempt at tort reform. *Sorenson v. St. Paul Ramsey Medical Center*, 457 N.W.2d 188, 190 (Minn. 1990). The Legislature sought elimination of “frivolous” cases, *Id.* at 191, and a bar to non-meritorious medical malpractice cases, *Stroud v. Hennepin County Medical Center*, 556 N.W.2d 552, 555. *See also Lindberg v. HealthPartners, Inc.*, 599 N.W.2d 572, 578 (Minn. 1999).

The certification of expert review statute requires two separate certifications. In the first, not at issue here, plaintiff’s attorney submits an affidavit, usually with the complaint, certifying that counsel has reviewed the facts of the case with a qualified expert who has opined that defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff. Minn. Stat. § 145.682, subd. 3.

² Minn. Stat. §§ 595.02, subd. 5; 541.15(b); and 145.682.

It is the second certification requirement that is at issue here. Within 180 days after commencement of the suit against defendants, plaintiff must identify, by affidavit or answers to interrogatories,

Whom plaintiff expects to call as an expert witness at trial to testify with respect to the issues of 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. § 145.682, subd. 4. Failure to comply with this requirement results, upon motion, “in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a *prima facie* case.” Minn. Stat. § 145.682, subd. 6(b).

There have been two amendments to this second certification requirement. A 1992 amendment specified that the affidavit or answers to interrogatories that identify plaintiff’s expert must be signed under oath by both plaintiff’s counsel and the expert. Minn. Laws 1992, ch. 549, art. 8, § 1. A 2002 amendment added procedural requirements for the motion to dismiss brought by defendants following plaintiff’s failure to meet the second certification requirement. These procedures require defendants to identify the claimed deficiencies in the affidavit of expert identification, serve the motion for dismissal at least 45 days before the hearing, and give plaintiff opportunity to amend the affidavit of expert identification to correct claimed deficiencies prior to the hearing. Minn. Stat. § 145.682, subd. 6(c); Minn. Laws 1992, ch. 403, § 1. The 2002 amendments brought the certification requirements in medical malpractice cases in line with those

required in malpractice actions against attorneys, architects, CPAs, engineers, and other professionals. Minn. Stat. § 544.42, subd. 6(c).

B. The Trial Court Properly Held That Appellant Failed To Meet The Requirements Of The Expert Review Statute.

Appellant has not met the statutory requirements for an affidavit of expert identification in regard to his claim of permanent injuries. The affidavit of expert identification requires:

A sworn signature by plaintiff's counsel and each expert;

The identity of each expert expected to be called at trial;

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. § 145.682, subd. 4(a). These are "strict statutory requirements" which are "uncomplicated and unambiguous." *Lindberg*, 599 N.W.2d at 573, 577. These requirements are not met with "empty conclusions," e.g., expert affidavits stating that defendant has "failed to properly evaluate" or "failed to properly diagnosis." *Sorenson*, 457 N.W.2d at 192-93. It is not sufficient for the affidavit of expert identification to rely on broad conclusory statements, e.g., "the breach of standard of care" was a "failure to diagnose and treat." *Stroud*, 556 N.W.2d at 554, 556.

Since 1990, the Minnesota Supreme Court has been clear on plaintiff's burden:

In cases commencing after this opinion was filed, however, we will expect a more complete disclosure In future cases, plaintiffs will be expected to set forth by affidavit or answers to interrogatories, specific details concerning their experts' expected testimony, including the applicable standard of care, the acts or omissions that plaintiffs allege violated the

standard of care and an outline of the chain of causation that allegedly results in damage to them.

Sorenson, 457 N.W.2d at 193.

The Supreme Court has further stated that this burden on plaintiff is not overcome by the absence of prejudice to defendants, failure of defendants to prove plaintiff's claim to be frivolous, or the failure of defendants to alert plaintiff to the inadequacies of expert affidavits. *Lindberg*, 599 N.W.2d at 578.

A plaintiff's failure to meet this burden mandates exclusion of claims necessitating expert testimony. Minn. Stat. § 145.682, subd. 6(c); *Lindberg*, 599 N.W.2d at 578. After the Supreme Court's 1990 decision in *Sorenson*, it has reversed the Court of Appeals four times to repeatedly reassert the strict statutory requirements pertaining to the identification of experts. *Stroud*, 556 N.W.2d 552; *Lindberg*, 599 N.W.2d 572; *Anderson v. Rengachary*, 608 N.W.2d 843 (Minn. 2000); *Teffeteller v. University of Minnesota*, 645 N.W.2d 420 (Minn. 2002).

The State Respondents acknowledge that the affidavit of dermatologist Dr. Alan Boyd establishes a *prima facie* case of negligence causing second degree burns of the skin. However, the scope of the Boyd affidavit is very narrow while the medical issues involve not only dermatology but ophthalmology and rheumatology as well. Furthermore, Boyd's affidavit only addressed causation in regard to second degree burns

to the skin; it is silent as to permanent injuries. Finally, it is totally silent (and unqualified) as to injury to Appellant's eyes.³

Appellant's preexisting medical condition makes this precisely the type of case for which the expert review statute was intended: a complicated case of medical causation involving multiple specialties and not within the common knowledge of a typical juror.

Appellant entered the Minnesota correctional system with multiple diagnoses. R.A. 22-45. Upon admission, in February 1998, he complained of arthritis pain. R.A. 23. Rheumatoid arthritis affected his legs, hips and lower back, R.A. 26, and he was prescribed paxil for this. Also on admission he had a wide variety of skin ailments including psoriasis, acne, scabies, rashes, papules, and lesions all over his body. R.A. 25. These medical issues were perhaps inter-related, as he was diagnosed with "probable psoriatic arthritis." R.A. 27.

The most critical issue of medical causation in this case is whether Appellant's claims of blurred vision, eye discomfort and photosensitivity are caused by UV over-exposure or something else. One year after the incident, a consulting ophthalmologist stated:

In summary, he presents with complaints of blurred vision and ocular discomfort without obvious explanation on the eye examination. I did not feel his minimal punctuate epithelial keratitis from ultra violet exposure on 5/31/00 could explain his symptoms. It is conceivable that he has ocular

³ Appellant apparently concedes that his listing of Dr. Troy Rustad, a dermatologist, and Dr. Jeffrey Ketcham, an ophthalmologist, in answers to interrogatories does not meet the requirements of the expert review statute. R.A. 59-60. Indeed, neither listing states an opinion of any kind. Nor have the doctors signed the response. Thus, the only affidavit of expert identification before this Court is Dr. Boyd's.

surface disease given the presence of rheumatoid arthritis, and time may reveal signs of disease, but again I could not detect any at his visit today.

A. 42. Three years later, the State Respondents continued to report to a consulting ophthalmologist that the cause of Appellant's eye problem was uncertain:

The [aqueous] deficient portion of his dry eyes is probably associated with his seronegative rheumatoid arthritis. The question is whether the meibomian gland dysfunction could be associated with the prolonged [UV] treatment.

A. 53-54. Notwithstanding this unresolved, complicated issue of permanent eye dysfunction, Appellant submitted no expert affidavit from an ophthalmologist.

Appellant's claim of permanent injury to his vision is especially significant given his claim of a career as an artist. R.A. 52-53. He states that he is now especially sensitive to light, requiring him to wear tinted glasses indoors and outdoors as well as a broad brimmed hat. R.A. 53. Further, he claims that exposure to direct sunlight causes him to break out in a rash, get dizzy and nauseous. A. 58. He also claims that florescent light can have a similar effect. A. 50. Clearly, the expert review statute entitles respondents to expert affidavits establishing a *prima facie* case in regard to these claims of permanent damage to the eyes and skin.

Dr. Boyd's affidavit, A. 105, is the only affidavit submitted by Appellant. It is dated July 2, 2002. Its only statement as to causation is contained in a single sentence which reads, "it is my further opinion that the departure from the standard of care was a direct cause of Robert Mercer's second degree burns." A. 106. This conclusory statement pertains only to the immediate injury to Appellant's skin. It does not address whether his subsequent dermatological condition is caused by his preexisting skin

conditions, rheumatoid arthritis, a reaction to medications, the UV overexposure, or something else.

It goes without saying that the affidavit of a dermatologist cannot establish causation as to Appellant's eye problems — short term or long term — at all. Appellant simply provided the trial court nothing to meet the requirement of the expert review statute in this regard. Accordingly, the trial court properly dismissed the claim for these damages.

III. APPELLANT FAILED TO DEMONSTRATE GOOD CAUSE FOR AN EXTENSION OF THE TIME LIMIT PERTAINING TO THE AFFIDAVIT OF EXPERT IDENTIFICATION.

Failure to provide an affidavit of expert identification results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a *prima facie* case. Minn. Stat. § 145.682, subd. 6(b). However, the Court may, for “good cause shown” provide for an extension of the time limit. Minn. Stat. § 145.682, subd. 4(b).

The “good cause shown” standard has been interpreted to mean that the trial court may extend the deadline where the failure to act timely was the result of “excusable neglect.” *Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989) (applying the requirements of Minn. Stat. § 145.682 in conjunction with Minn. R. Civ. P. 6.02). Excusable neglect in the context of failure to comply with the expert affidavit requirement of Minn. Stat. § 145.682 is deemed to be met when:

- 1) The plaintiff has a reasonable case on the merits; 2) the plaintiff has a reasonable excuse for his failure to comply with the requirement of Minn. Stat. § 145.682 for the service of an expert witness disclosure; 3) the

plaintiff acted with due diligence; and 4) the defendant would not suffer substantial prejudice if the extension of time were granted.

Parker v. O'Phelan, 414 N.W.2d 534, 537 (Minn. Ct. App. 1987), *aff'd* by equally divided court, 428 N.W.2d 361 (Minn. 1988); *Bellacourt v. U.S., et al.*, 784 F. Supp. 623, 636-37 (D. Minn. 1992), *aff'd* 994 F. 2d 427 (8th Cir. 1993), *reh'g denied; cert. denied*, 510 U.S. 1109 (1994).

A review of these factors demonstrates that Appellant failed to demonstrate excusable neglect. Accordingly, the trial court was within its discretion in barring claims unsubstantiated by an affidavit of expert identification.

A. Appellant Has Not Shown A Reasonable Case On The Merits With The Exception Of His Claim Of Having Received Second Degree Burns.

Appellant submitted a single affidavit in response to the statutory requirement, that of dermatologist Dr. Alan Boyd. A. 105. Dr. Boyd opined that the departure from the standard of care was a direct cause of only one consequence — second degree burns. *Id.* at A. 106, ¶ 5. Dr. Boyd's affidavit is silent as to permanent injury to Appellant's skin. *Id.* Furthermore, Dr. Boyd offers no opinion as to the standard of care or causation in regard to Appellant's claimed eye injury. Of course, not being an ophthalmologist, he is not qualified to do so. Thus, the Boyd affidavit is inadequate to substantiate a reasonable case on the merits for any injury other than Appellant's second degree burns to the skin.

B. The Fact That Appellant, As An Inmate, Had To Obtain Permission From The Warden And Prepay For A Doctor's Visit Does Not Constitute A Reasonable Excuse For Failing To Obtain The Necessary Expert Affidavit.

Under Department of Corrections Policy 500.135 ("Offender Requested Private Health Care"), A. 196-98, an inmate who wants to be seen by a private physician must make a written request, obtain Warden approval, and prepay the cost of the visit which includes the cost of transportation and the cost of accompanying security. *Id.*, R.A. 82-83 (Affidavit of State's attorney, ¶ 4). Appellant utilized this policy to be seen by Dr. Troy Rustad, a dermatologist, and Dr. Jeffrey Ketcham, an ophthalmologist. Both physicians are located in Red Wing where Appellant was then incarcerated. *Id.* ¶ 5.

Appellant attempts to blame his consulting ophthalmologist, Corrections Department policies, and the State's counsel for his failure to obtain the necessary expert affidavit. These efforts to shift responsibility to others fails.

First, Appellant followed DOC policy and arranged a consultation with Dr. Rustad. But when Appellant's counsel sought to obtain a referral from Dr. Rustad to the Mayo Clinic, the doctor declined, saying that such a referral needed to come from Appellant's treating physician. A. 199-200, ¶ 6.

Second, Appellant complains that the DOC policy regulating use of private health care is "arduous and time consuming." Undeniably, Appellant faced some requirements that applied to him because he was incarcerated for a serious crime. However, the requirements to make a written request, obtain permission from the Warden, and to

prepay the cost (including transportation and security costs) were reasonable, known to Appellant, and in fact utilized by him to see Drs. Rustad and Ketcham on three occasions.

Furthermore, on January 11, 2005, nearly a month before the February 3, 2005 hearing, Appellant's counsel called the State's counsel asking that the Department of Corrections waive the prepayment requirement of the policy. R.A. 83, ¶ 6. Appellant's counsel was told that it was unlikely the Department would waive the prepayment requirement but that inquiry would be made. *Id.* ¶ 7. One week later, this was confirmed. *Id.* ¶ 8.

The record does not substantiated Appellant's claim that he could not obtain a referral but rather reflects the fact that the State declined to pay for it. The Department's policy regulating inmate use of private health care is reasonable and should not be Appellant's scapegoat for his failure to obtain the necessary expert affidavit.

C. Appellant Failed To Act With Due Diligence After Receiving Notice Of The Motion To Strike Claims For Want Of An Expert Affidavit.

An assessment of whether Appellant acted with due diligence must be made in the context of his having obtained the very limited affidavit of dermatologist Dr. Boyd in July 2002. Although Appellant arranged consultations with dermatologist Dr. Rustad and ophthalmologist Dr. Ketcham and disclosed them as experts on November 4, 2004, R.A. 60-61, he seeks to portray Dr. Rustad's refusal to refer him to the Mayo Clinic on November 4, 2004 as the last minute surprise that precluded him from obtaining an expert for the February 3, 2005 hearing. (“[Appellant] specifically sought a referral and was denied that referral as the 45 days lapsed.” Appellant's brief at 22).

Dr. Rustad informed Appellant three months before the hearing that he would not make a referral to the Mayo Clinic. A. 200, ¶ 6. Appellant learned on January 11, 2005, on the day his counsel called State's counsel, that the Department was unlikely to waive the prepayment requirement. R.A. 83, ¶ 7. Appellant had ample time to arrange a consultation resulting in an expert affidavit. Contrary to Appellant's representations, he made no request, written or otherwise, to see a private physician as permitted under the policy other than Drs. Rustad and Ketcham — from whom he never obtained an opinion. R.A. 84, ¶ 9.

Three months before the hearing, on November 4, 2004, Dr. Rustad declined Appellant's request for a referral to the Mayo Clinic. For the next three months up to the hearing on February 3, 2005, Appellant did not act with due diligence. Rather, he seeks to blame the reasonable requirements of the Department's policy and the prompt response of State's counsel as the reasons for his failure to comply. The trial court acted reasonably when it granted Respondents' motion to dismiss Appellant's claims for permanent injuries for failure to comply with the expert review statute.

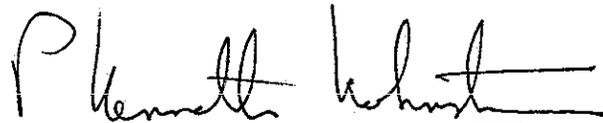
CONCLUSION

The trial court did not abuse its discretion in dismissing Appellant's claims premised on permanent injury to his skin and eyes. Nor did the Court abuse its discretion in denying Appellant an extension of time to produce an expert affidavit. Accordingly, the trial court's rulings should be affirmed.

Dated: September 26, 2005

Respectfully submitted,

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