

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.*

RESPONDENTS STEVEN ANDERSEN, M.D. AND  
CORRECTIONAL MEDICAL SERVICES, INC.'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,  
Professional Association  
Mark W. Hardy, Esq. (#0311121)  
386 North Wabasha Street, Suite 1400  
Saint Paul, Minnesota 55102  
(651) 291-1177

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

MICHAEL A. HATCH  
Minnesota Attorney General  
P. Kenneth Kohnstamm, Esq. (#5740X)  
Assistant Attorney General  
1100 Bremer Building  
445 Minnesota Street  
Saint Paul, Minnesota 55101-2128  
(651) 282-5729

*Attorneys for Respondents Connie Ring,  
R.N. and State of Minnesota*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... iv

STATEMENT OF THE ISSUES ..... 1

STATEMENT OF THE CASE ..... 3

STATEMENT OF THE FACTS ..... 4

LEGAL ARGUMENT ..... 12

I. STANDARD OF REVIEW ..... 12

    A. Dismissal With Prejudice ..... 12

        1. Statute of Limitations ..... 13

    B. Dismissal Pursuant to Minn. Stat. § 145.62 ..... 13

    C. Denial of Motion to Extend the District Court’s Scheduling Order and  
        the Deadline for Service of Affidavit of Expert Disclosure Pursuant to  
        Minn. Stat. § 145.682 ..... 13

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT  
DISMISSED APPELLANT’S CLAIMS AGAINST DR. ANDERSEN WITH  
PREJUDICE BASED UPON APPELLANT’S FAILURE TO  
ADEQUATELY SERVE DR. ANDERSEN PRIOR TO THE RUNNING OF  
THE STATUTE OF LIMITATIONS ..... 14

    A. The District Court Did Not Abuse Its Discretion When it Decided the  
        Statute of Limitations Issue After Appellant Conceded, in Response to  
        Dr. Andersen’s Motion to Dismiss, that Dr. Andersen Had Not Been  
        Adequately Served with Process ..... 14

    B. Because Dr. Andersen Was “Subject To Process” at All Relevant  
        Times and Because Appellant Failed to Create a Genuine Issue of  
        Material Fact as to Whether He Conducted a “Diligent Search” for  
        Dr. Andersen, the Distict Court Did Not Err When It Held that the  
        Statute of Limitations Was Not Tolloed Under Minn. Stat. § 541.13 ..... 17

1.	Dr. Andersen Was at All Relevant Times “Subject to Process” .....	17
2.	Appellant Failed to Create a Genuine Issue of Material Fact as to Whether or Not He Conducted a “Diligent Search” for Dr. Andersen .....	20
III.	THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN, PURSUANT TO MINN. STAT. § 145.682, IT GRANTED DISMISSAL OF APPELLANT’S CLAIMS FOR DAMAGES FOR LONG-TERM AND/OR PERMANENT INJURIES COMPLETELY UNSUPPORTED BY EXPERT OPINION .....	23
A.	Legal Standard for Motions to Dismiss Under Minn. Stat. § 145.682 and Relevant Caselaw .....	23
B.	The District Court Did Not Abuse Its Discretion When it Dismissed Appellant’s Claims for Damages for Long-Term and/or Permanent Injuries Pursuant to Minn. Stat. § 145.682 Because Appellant’s Only Affidavit to Expert Identification Fails to Address Causation of Appellant’s Alleged Long-Term and/or Permanent Injuries.....	25
1.	The Statute Required Appellant’s Affidavit of Expert Identification to Outline a Detailed Chain of Causation Connecting the Alleged Departure from the Standard of Care to Appellant’s Claimed Injuries .....	25
2.	Appellant’s Affidavit of Expert Identification Does Not Even Address Causation of Appellant’s Claimed Long-Term and/or Permanent Injuries o His Eyes and Skin .....	30
C.	Minn. Stat. § 145.682 Required Appellant to Provide Affidavits from Qualified Expert Witnesses that Provide a Detailed Outline of the Chain of Causation Between Defendants’ Alleged Negligence and Each of Plaintiff’s Claimed Injuries.....	31
D.	Plaintiff’s Case is Not a Rare Medical Malpractice Case Whereby Expert Testimony is Not Required.....	34

IV.	THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT HELD THAT APPELLANT FAILED TO ESTABLISH EXCUSABLE NEGLIGENCE AND WAS THEREFORE NOT ENTITLED TO RETROACTIVE EXTENSION OF THE EXPERT DISCLOSURE DEADLINE IMPOSED BY THE DISTRICT COURT'S SCHEDULING ORDER OR THE 180-DAY STATUTORY DEADLINE .....	35
A.	Plaintiff Was Not Entitled to Extension of the Statutory Deadline Past the 180-Day Time Limit Because He Failed To Establish Excusable Neglect .....	35
1.	If Appellant Established that He Has a Reasonable Case on the Merits, That Case is Only for Plaintiff's Claim that Relates to His Short-Term Dermatological Injury, i.e., His Second Degree Burns .....	36
2.	Appellant Did Not Establish a Reasonable Excuse for Failing to Meet the Statutory Time Limits .....	36
3.	Appellant Offered No Evidence that He Has Proceeded with Due Diligence .....	39
	CONCLUSION .....	40
	CERTIFICATE OF COMPLIANCE .....	41
	INDEX TO APPENDIX .....	42

## TABLE OF AUTHORITIES

### Statutes

Minn. Stat. § 45.028, subd. 2 .....	8, 9, 22
Minn. Stat. § 541.13 .....	1, 9, 14, 15, 17
Minn. Stat. § 543.19 .....	1, 18
Minn. Stat. § 145.682 ... 1, 2, 3, 4, 11, 13, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 37, 40	

### Other Authorities:

Minn. R. Civ. LP. 301(3).....	14
Minn. R. Civ. P. 4.04 (c) .....	1, 19, 20
Minn. R. Civ. P. 6.02.....	2, 33
Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, 20 U.S.T. 361.....	19

### Cases:

<u>Almor Corp. v. County of Hennepin,</u> 566 N.W.2d 696, 701 (Minn. Ct. App. 2000) .....	12
<u>Anderson v. Rengachary,</u> 608 N.W.2d 843, 846 (Minn. 2000) .....	1, 2, 13, 24, 26, 28, 29, 36, 38
<u>Broehm v. Mayo Clinic,</u> 690 N.W.2d 721 (Minn. 2005) .....	1, 2, 13, 32, 37
<u>Demgen v. Fairview Hospital and Healthcare Services,</u> 621 N.W.2d 259, 261 (Minn. Ct. App. 2001) .....	13
<u>Doe v. Redeemer Lutheran Church,</u> 531 N.W.2d 897, 900 (Minn. Ct. App. 1995) .....	17
<u>Duresky v. Hanson,</u> 329 N.W.2d 44, 47-49 (Minn. 1983).....	1, 17, 20
<u>Fabio v. Bellomo,</u> 504 N.W.2d 758, 762 (Minn. 1993) .....	24

Gross v. Victoria State Farms, Inc.,  
578 N.W.2d 757, 761 (Minn. 1998) ..... 13

Haile v. Sutherland,  
598 N.W.2d 424, 428 (Minn. Ct. App. 1999) ..... 24, 33

Johnson v. Huseby,  
469 N.W.2d 742, 745 (Minn. Ct. App. 1991) ..... 1, 14, 17, 18, 19, 20

Kaiser-Bauer v. Mullan,  
609 N.W.2d 905 (Minn. Ct. App. 2000) ..... 31

Lewis v. Contracting Northwest, Inc.,  
413 N.W.2d 154 (Minn. Ct. App. 1987) ..... 15, 16

Lindberg v. HealthPartners, Inc.,  
599 N.W.2d 572, 576 (Minn. 1999) ..... 26, 27, 29

Long v. Moore,  
204 N.W.2d 641, 643 (Minn. 1973) ..... 16

Maudsley v. Pederson,  
676 N.W.2d 8, 12 (Minn. Ct. App. 2004) ..... 1, 25, 29, 32, 33

Minn. Humane Soc’y v. Minn. Federated Humane Soc’ys,  
611 N.W.2d 587, 590 (Minn. Ct. App. 2000) ..... 12  
(citing Firoved v. General Motors Corp.,  
277 Minn. 278, 283, 152 N.W.2d 364, 368 (Minn. 1967))

Moen v. Mikhail,  
454 N.W.2d 422, 422 (Minn. 1990) ..... 36

Plutshack v. University of Minnesota Hosp.,  
316 N.W.2d 1, 5 (Minn. 1982) ..... 24

Ryan v. ITT Life Ins. Corp.,  
450 N.W.2d 126, 128 (Minn. 1990) ..... 13

Sorenson v. St. Paul Ramsey Medical Center,  
457 N.W.2d 188, 191 (Minn. 1990) ..... 24, 26, 29, 35

<u>State ex rel. Humphrey v. Philip Morris, Inc.</u> 606 N.W.2d 676, 685 (Minn. Ct. App. 2000) .....	12
<u>Ryan v. ITT Life Ins. Corp.</u> , 450 N.W.2d 126, 128 (Minn. 1990) .....	13
<u>Stern v. Dill</u> , 442 N.W.2d 322, 324 (Minn. 1989) .....	35
<u>Stroud v. Hennepin county Medical Center</u> , 556 N.W.2d at 552, 556 (Minn. 1996) .....	26, 27, 29
<u>Teffeteller v. University of Minnesota</u> , 645 N.W.2d 420 (Minn. 2002) .....	1, 24, 25, 26, 28, 29, 33
<u>Tousignant v. St. Louis County</u> , 615 N.W.2d 53 (Minn. 2000) .....	34

**Unpublished Cases:**

## STATEMENT OF THE ISSUES

**I. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT DISMISSED APPELLANT'S CLAIMS AGAINST DR. ANDERSEN WITH PREJUDICE BASED UPON APPELLANT'S FAILURE TO ADEQUATELY SERVE DR. ANDERSEN WITH PROCESS PRIOR TO THE RUNNING OF THE STATUTE OF LIMITATIONS?**

The district court, in the exercise of its sound judgment and discretion, dismissed appellant's claims against Dr. Andersen, with prejudice.

- Johnson v. Huseby, 469 N.W.2d 742, 745 (Minn. Ct. App. 1991)

**A. Did the District Court Err When It Held that the Statute of Limitations Was Not Tolloed Under Minn. Stat. § 541.13 Because Dr. Andersen Was "Subject To Process" at All Relevant Times and Because Appellant Failed to Create a Genuine Issue of Material Fact as to Whether He Conducted a "Diligent Search" for Dr. Andersen?**

The district court did not err when it held that the statute of limitations had not been tolloed under Minn. Stat. § 541.13 because Dr. Andersen was "subject to process" at all relevant times and because appellant failed to create a genuine issue of material fact as to whether he conducted a "diligent search" for Dr. Andersen.

- Johnson v. Huseby, 469 N.W.2d 742, 745 (Minn. Ct. App. 1991)
- Duresky v. Hanson, 329 N.W.2d 44, 47-49 (Minn. 1983)
- Minn. Stat. § 541.13
- Minn. Stat. § 543.19
- Minn. R. Civ. P. 4.04 (c)

**II. DID THE DISTRICT ABUSE ITS DISCRETION WHEN, PURSUANT TO MINN. STAT. § 145.682, IT DISMISSED APPELLANT'S CLAIMS FOR DAMAGES FOR LONG-TERM AND/OR PERMANENT INJURIES WHERE THE ONLY EXPERT AFFIDAVIT PROVIDED BY APPELLANT FAILED TO ADDRESS CAUSATION OF SUCH INJURIES?**

The district court, in the exercise of its sound judgment and discretion, dismissed appellant's claims for damages for long-term and/or permanent injuries.

- Teffeteller v. University of Minnesota, 645 N.W.2d 420 (Minn. 2002)
- Anderson v. Rengachary, 608 N.W.2d 843, 846 (Minn. 2000)
- Broehm v. Mayo Clinic, 690 N.W.2d 721 (Minn. 2005)
- Maudsley v. Pederson, 676 N.W.2d 8, 12 (Minn. Ct. App. 2004)
- Minn. Stat. § 145.682

**III. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR AN EXTENSION OF THE 180-DAY STATUTORY DEADLINE FOR SERVICE OF AFFIDAVITS OF EXPERT IDENTIFICATION AND FOR EXTENSION OF THE DEADLINE FOR EXPERT DISCLOSURE SET BY THE DISTRICT COURT'S SCHEDULING ORDER?**

The district court, in the exercise of its sound judgment and discretion, denied appellant's motion for an extension of the statutory and court-ordered deadlines for expert disclosure.

- Broehm v. Mayo Clinic, 690 N.W.2d 721 (Minn. 2005)
- Anderson v. Rengachary, 608 N.W.2d 843, 846 (Minn. 2000)
- Minn. Stat. § 145.682
- Minn. R. Civ. P. 6.02

## STATEMENT OF THE CASE

This appeal arises from two separate dismissals granted by the Honorable John T. Finley in a medical negligence action brought by plaintiff Robert Mercer (“appellant”) in the Second Judicial District Court, Ramsey County, Minnesota. (Appellant’s Appendix (“A”), A100-104, A206-213.) Appellant brought claims against Steven Andersen, M.D., Correctional Medical Services, Inc. (“CMS”), Connie Ring, R.N., and the State of Minnesota Department of Corrections based upon medical care and treatment that occurred on or about May 30 and 31, 2000 while appellant was incarcerated at Minnesota Correctional Facility – Moose Lake. (A60-65.) Appellant claims that the alleged negligent care and treatment directly caused a variety of injuries to his skin and eyes. (A64.) Some of these alleged injuries are properly characterized as short-term in nature and appellant’s medical records indicate that they resolved within weeks of the alleged negligent care and treatment. (Respondents Dr. Andersen and CMS’s Appendix (“R.A.”) 20-45.) Some of plaintiff’s claimed injuries are properly characterized as long-term and/or permanent in nature. (A64)

On August 13, 2004, Dr. Andersen brought a motion to dismiss appellant’s claims against him, with prejudice, based upon insufficiency of service of process within the four-year statute of limitations applicable to medical negligence actions. (A100.)

In an Order and Memorandum dated 25, 2004 Judge Finley granted Dr. Andersen’s motion to dismiss with prejudice. (A100-104.)

On February 3, 2005, respondents CMS, Ring and the Department of Corrections, brought a motion for partial dismissal pursuant to the expert affidavit requirements of Minn. Stat. § 145.682. (A206.) Respondents’ motions were based upon the insufficiency

of appellant's expert disclosures, which failed entirely to address causation of appellant's long-term and/or permanent injuries. (A206-213.)

In response to respondents' motions for partial dismissal, appellant brought a motion for extension of the statutory and court-ordered deadlines for expert disclosure. (A203.) Appellant's motion was also heard on February 3, 2005. (Id.)

In an Order and Memorandum dated February 15, 2005, Judge Finley granted respondent's motions for partial dismissal pursuant to the expert affidavit requirements of Minn. Stat. § 145.682. (A206-211.) In an Order and Memorandum dated February 16, 2005, Judge Finley denied appellant's motion for extension of the expert disclosure deadlines. (A212-213.)

Appellant moved the district court for an order entering final judgment of both its August 25, 2004 and February 15, 2005 Orders. Respondents did not oppose this motion and judgment was entered on all of the above Orders on April 21, 2005. This appeal followed.

### **STATEMENT OF FACTS**

#### **A. Medical Events at Issue**

Prior to May 30, 2000, appellant had an established diagnosis of psoriasis. (R.A. 27-30, A17.) His medical records show that while incarcerated and prior to May 30, 2000 he had also previously experienced acne-like and rash-like symptoms with reddened, inflammatory papules on his chest, back, upper arms and thighs. (R.A. 23-29.) Appellant has also been diagnosed with arthritis for which he takes plaquenil. (R.A. 26, 42.) Appellant's vision is regularly checked to determine if he has experienced any decrease in vision due to potential side effects of plaquenil. (R.A. 42.)

On May 30, 2000, appellant was seen by Dr. Steven Andersen for ongoing treatment of psoriasis. (A17.) Dr. Andersen prescribed ultraviolet light treatments. The prescription for ultraviolet light stated, "UV light – to area of face – three times a week – 20 minutes a time – PRN x 6 months." (A18.)

On May 31, 2000, appellant presented to Health Services for his first ultraviolet light treatment. (A40.) He was seen by Connie Ring, R.N. (See Id.) Appellant claims that Nurse Ring provided no instructions whatsoever regarding the use of the ultraviolet light machine. (A60-65.) He claims that he didn't hear Nurse Ring say anything about wearing protective goggles, but admits that she may have told him to wear them. (R.A. 47.)

Nurse Ring's Note states that appellant was "instructed on use including to use the goggles for protection." (A40.)

Nurse Ring gave appellant the key which activated the UV light machine. (R.A. 47.) Appellant has stated he was told by Nurse Ring to use the machine for 15 minutes. (Id.) In the presence of a corrections officer, appellant set up the machine by himself, took off all of his clothes except for his shorts, turned on the light with the key, and stood facing the light, and then stood with his back to the light, for a total of 15 minutes. (Id.) Appellant has admitted that as he was setting up the machine the corrections officers stated, "she said you could wear these glasses if you want." (Id.) Appellant saw was offered protective goggles but decided not to wear them and instead closed his eyes. (Id.)

On June 1, 2000, appellant returned to Health Service and was seen by Faith Peterson, R.N. Nurse Peterson noted that appellant's skin appeared burned, and that his eyes were red and watering. (A40, A44.) Nurse Peterson consulted with Dr. Dean Lee

who ordered antibiotic ointments for appellant's eyes and skin. (Id.) Appellant was kept in med lay-in for the day and was given Ibuprofen for pain. (Id.) Nurse Peterson arranged referral to ophthalmologist Dr. Kevin Treacy. (Id.) Dr. Treacy diagnosed keratitis<sup>1</sup> without obvious infection. (Id.) Dr. Treacy recommended continued use of antibiotic ointment, eye drops, and that appellant return in two weeks for follow-up. (Id.)

On June 6, 2000, Appellant was seen by Dr. Chris Ceman. (R.A. 35.) On exam Dr. Ceman found "2nd degree burns" on appellant's face and chest and "resolving keratitis." (Id.)

On June 8, 2000, Appellant was again seen by Dr. Steven Andersen. (A41.) Dr. Andersen, in his dictated note for this date stated: "I had been informed by nursing staff that he did not wear UV eye protection as ordered and that he exposed virtually his entire body to UV light (he was wearing boxer shorts only) despite the fact that I intended this treatment for a small area on left side of his face only." (Id.) On exam Dr. Andersen found burns covering much of appellant's body, but also noted that appellant's burns were healing well. (Id.) Dr. Andersen's diagnosis was ultraviolet burns to skin and keratitis of both eyes. (Id.) To treat the patient's skin Dr. Andersen recommended that the antibiotic ointment be continued and that skin moisturizing cream be used until peeling of the skin stopped. (Id.) Dr. Andersen provided a prescription for ultraviolet protective glasses and recommended that appellant return to the ophthalmologist in 3-4 weeks. (Id.)

---

<sup>1</sup> Inflammation of the cornea.

On June 13, 2000, Appellant was seen by Dr. Ceman. (A41.) Dr. Ceman found slight redness on the patient's chest and anterior thighs. (Id.) The burns on the patient's face were completely healed. (Id.)

On June 16, 2000 appellant was seen by Dr. Taylor, a staff optometrist. (R.A. 41.) He complained of continued blurred vision, sensitivity to bright lights, and irritating, "burning" eyes. (Id.) On exam Dr. Taylor found some continued inflammation of the eyelids and conjunctiva. (Id.) However, the keratitis had resolved and the cornea and all the structures in the back of the eye were entirely normal. (Id.)

On June 20, 2000, appellant was seen again by Dr. Ceman. (R.A. 37.) Dr. Ceman's written diagnosis indicates "99% resolution" of the burns from the ultraviolet exposure. (Id.)

On June 22, 2000, appellant was seen by ophthalmologist Dr. Treacy, who found that the conjunctiva, eyelids and cornea were all clear and that the keratitis had resolved. (R.A. 44.)

In May of 2001, almost a year after appellant's UV treatment, appellant was examined again by Dr. Treacy. (A42-43.) In a letter to Dr. Taylor dated May 9, 2001, Dr. Treacy stated he found no obvious explanation for appellant's complaints of continued blurred vision and ocular discomfort. (Id.) Dr. Treacy explicitly stated that he did not feel that the appellant's keratitis from UV exposure on May 31, 2000 could explain the appellant's symptoms of continued blurred vision and discomfort. (Id.) In apparent response to an inquiry from appellant's attorney, Dr. Treacy restated this conclusion in a letter to appellant's attorney dated June 11, 2001. (R.A. 44-45.)

It is undisputed that for a period of time following his exposure to the UV light treatment on May 30, 2000, that appellant suffered from burns to his skin over much of his body and from keratitis. It is also undisputed that during this time appellant complained of dizziness, weakness, nausea, headache, and difficulty sleeping, as well as painful, red, irritated, watery eyes and burred vision.

**B. Service of Process on Dr. Andersen**

Plaintiff, in his Complaint, alleges that Dr. Andersen, Correctional Medical Services, Inc. Connie Ring, R.N. and the State of Minnesota, Department of Corrections provided substandard care to plaintiff on or about May 30, 2000, and that as a result of this alleged negligence, plaintiff sustained injuries and damages. (A60 – 65.)

In August 2000, Dr. Andersen and his family moved to Haiti where they currently reside. (A86.) Dr. Andersen is a missionary physician with Lumiere Medical Ministries in Haiti where he is the Medical Director of Centre Sante Lumiere, a clinic in southern in the southern part of the country. (Id.)

Plaintiff first attempted to serve Dr. Andersen by mailing a copy of the Summons and Complaint to Attorney Robert Mahoney on or about March 19, 2004. (A89, A66.) On March 22, 2004, after plaintiff learned that Mr. Mahoney had not been authorized to accept service, Carlton County Sheriff's Deputy, Anthony Bastien, attempted to serve Dr. Andersen with process at the Moose Lake Correctional Facility. (A90, A68.) Through that attempt at service, plaintiff learned that Dr. Andersen was "in Haiti or on a missionary trip," as Deputy Bastien was apparently informed. (Id.)

In an Affidavit subscribed and sworn to on April 7, 2004, plaintiff's attorney stated that "on April 8, 2004 in accordance with the requirements of Minn. Stat. §45.028,

subd. 2” . . . he caused a copy of the Summons and Complaint to be served via hand delivery upon the Commissioner of Commerce as “the duly appointed attorney to receive service of process for defendant Steven Andersen, M.D.” (A70-71.) In that affidavit, plaintiff’s attorney further swore that on April 8, 2004 in accordance with Minn. Stat. § 45.028, subd. 2, he caused notice of the service and a copy of the process to be served on Dr. Andersen via Certified U. S. Mail to P.O. Box 15665, West Palm Beach, Florida 33416, his last-known mailing address. (See Id.)

Plaintiff’s attorney then had the Summons in this case published in May 13, 20, and 27, 2004, editions of the St. Paul Legal Ledger. (A72, A74.)

On August 13, 2004, Dr. Andersen moved for dismissal of the claims against him, with prejudice, for plaintiff’s failure to serve him with process within the applicable statute of limitations. (A75-86.) In response to Dr. Andersen’s motion, plaintiff conceded that his attempts to serve Dr. Andersen personally, through Minn. Stat. § 45.028, subd. 2, and by publication, had not resulted in adequate service of process upon Dr. Andersen. (A87-96.) Instead plaintiff argued that although dismissal of the claims against Dr. Andersen was proper, the district court did not have jurisdiction to decide whether the statute of limitations had run and that even if the court did have jurisdiction to decide the issue, the statute had been tolled under Minn. Stat. § 541.13. (Id.) The district court held that the statute of limitations had not been tolled and granted Dr. Andersen’s motion for dismissal with prejudice. (A.100-104.)

At the time the District Court granted dismissal of the claims against Dr. Andersen, Dr. Andersen continued to reside in Haiti and had not been personally served with the Summons and Complaint in this matter. (A-86.)

**C. Plaintiff's Claims for Damages.**

In addition to claims for damages related to the burns plaintiff suffered to his skin, which healed within weeks of the UV exposure, plaintiff claims that he has suffered permanent injuries to his skin as a result of the defendants' alleged negligence. (A-60-65, R.A. 53.) Plaintiff claims as a result of the exposure to UV light treatment he must avoid all exposure to sunlight and that if he is exposed to sunlight for even extremely brief durations, he breaks out in "blisters." (Id.) Plaintiff also claims that he must remain on antibiotic medications to treat his skin, and that he must wear sunscreen and a wide-brimmed hat outdoors in order to protect his face from the sun. (Id.)

Plaintiff also claims that as a result of the alleged negligence of defendants, he has suffered permanent injury to his eyes resulting in extreme sensitivity to light and frequent irritation and dryness. (Id.) Plaintiff claims that he must constantly wear sunglasses and that he must continue to use medication to treat his eyes. (Id.) He also claims that he his career as an artist may have been adversely affected due to the alleged permanent injuries to his eyes. (Id.)

**D. Plaintiff's Affidavit of Expert Identification**

In accordance with the requirements of Minn. Stat. § 145.682, appellant served upon respondents only one affidavit from an expert physician.<sup>2</sup> That affidavit is from

---

<sup>2</sup> In Answers to Interrogatories, appellant also disclosed Jeffrey Ketcham, M.D. and Troy Rustad, M.D. as testifying expert witnesses (R.A.59-60.) The entire substantive portion of appellant's disclosure regarding the opinions of Dr. Rustad states: "Troy Rustad, M.D. will testify regarding his opinion surrounding the current medical condition of plaintiff and causal connection between the UV light treatment administered to plaintiff and plaintiff's subsequent burns and injuries to his skin" (Id.)

With regard to Dr. Ketcham, appellant's disclosure states: "[Dr. Ketcham] will testify regarding his opinion surrounding the causal connection between the UV light treatment administered to plaintiff and plaintiff's subsequent burns and injuries to his eyes. He will testify about the current medical care and treatment and future medical care and treatment of plaintiff surrounding his injuries" (Id.)

dermatologist Alan S. Boyd. (A105-107.) Dr. Boyd's entire affidavit includes only one sentence that addresses causation of appellant's injuries. (Id.) That sentence reads: "It is further my opinion that the departure from the standard of care was a direct cause of Robert Mercer's second degree burns." (Id.)

Appellant has not served respondents with any affidavit or signed and sworn interrogatory responses from a dermatologist or otherwise qualified expert that addresses causation of any of appellant's claimed dermatological injuries besides the second degree burns that resolved within weeks of the UV exposure.

Appellant has not, as required by Minn. Stat. § 145.682 served upon respondents an affidavit or signed and sworn interrogatory responses from an ophthalmologist or otherwise qualified expert witness that addressed causation of any of appellant's claimed eye injuries.

Appellant's attorney was first notified verbally by attorneys for respondents on October 21, 2004, more than three months prior to the date of the hearing before the district court on respondents' motions for partial dismissal pursuant to Minn. Stat. § 145.682, of respondents' assessment of the deficiencies of Dr. Boyd's affidavit regarding causation of appellant's claimed long-term and/or permanent injuries to his skin and eyes. (R.A. 78-79.) In accordance with the requirements of Minn. Stat.

---

Contrary to the requirements of Minn. Stat. § 145.682, subd. 4(a), these responses were not sworn to or signed and appellant did not serve affidavits from either physician. (Id.)

In their motions for partial dismissal pursuant to Minn. Stat. § 145.682 before the district court, respondents challenged the sufficiency of both disclosures substantive and procedural grounds. (A110-128, 133-141, R.A. 62-62-67.) Appellant has not asserted on appeal that either disclosure met the requirements of statute. (See appellant's Brief) Accordingly, this Brief does not address issues raised by these disclosures.

§ 145.682, respondents served their motions for partial dismissal on December 17, 2004, 45 days prior to the hearing before the district court.

The trial court's deadline for disclosure of the opinions of appellant's expert witnesses passed on December 1, 2004.<sup>3</sup> (A108-109.)

## LEGAL ARGUMENT

### I. STANDARDS OF REVIEW

#### A. Dismissal With Prejudice

An appellate court must affirm a district court's decision to dismiss claims with prejudice absent a showing that the district court abused its discretion. Minn. Humane Soc'y v. Minn. Federated Humane Soc'ys, 611 N.W.2d 587, 590 (Minn. Ct. App. 2000) (citing Firoved v. General Motors Corp., 277 Minn. 278, 283, 152 N.W.2d 364, 368 (Minn. 1967)). Under the abuse of discretion standard, a district court's decision will not be disturbed on appeal unless the court abused its discretion, exercised its discretion in an arbitrary or capricious manner or based its ruling on an erroneous view of law. State ex rel. Humphrey v. Philip Morris Inc., 606 N.W.2d 676, 685 (Minn. Ct. App. 2000); Almor Corp. v. County of Hennepin, 566 N.W.2d 696, 701 (Minn. 1997). An appellate court applying the abuse of discretion standard must give great deference to the district court's decision and not reverse simply because the appellate court might reach a decision

---

<sup>3</sup> In a footnote on page 21 of appellant's Brief, appellant appears to assert that respondents did not serve expert disclosures upon appellant. Although the issue of respondents' expert disclosures was not before the district court and is not properly before this Court, attorneys for respondents are compelled to respond to appellant's assertion. In accordance with the district court's Scheduling Order, respondents timely served upon appellant's attorneys, by fax and by mail, expert disclosures from a dermatologist and an ophthalmologist. Although not part of the record before the district court, an Affidavit of Mark W. Hardy and the cover letter and fax cover sheet indicating that the fax was received by appellant's attorneys are included as the last pages of respondents Andersen and CMS's appendix. (R.A 85-87.)

different than the district court. Gross v. Victoria State Farms, Inc., 578 N.W.2d 757, 761 (Minn. 1998).

**1. Statute of Limitations**

Determination of whether dismissal was proper based upon the running of the statute of limitations involves construction and application of the applicable statute of limitations. The construction and applicability of statutes of limitations are questions of law subject to de novo review on appeal. Ryan v. ITT Life Ins. Corp., 450 N.W.2d 126, 128 (Minn. 1990.)

**B. Dismissal Pursuant to Minn. Stat. § 145.682**

An appellate court must affirm a district court's dismissal of claims pursuant to Minn. Stat. § 145.682 absent a showing that the district court abused its discretion. Demgen v. Fairview Hospital and Healthcare Services, 621 N.W.2d 259, 261 (Minn. Ct. App. 2001); Anderson v. Rengachary, 608 N.W.2d 843, 846 (Minn. 2000).

**C. Denial of Motion to Extend the District Court's Scheduling Order and the Deadline Service of Affidavit of Expert Disclosure Pursuant to Minn. Stat. § 145.682**

The appellate court must affirm a district court's denial of an extension of the deadline for expert witness pretrial disclosure in a medical negligence action absent a showing that the district court abused its discretion. Broehm v. Mayo Clinic, 690 N.W.2d 721 (Minn. 2005.)

**II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED APPELLANT'S CLAIMS AGAINST DR. ANDERSEN WITH PREJUDICE BASED UPON APPELLANT'S FAILURE TO ADEQUATELY SERVE DR. ANDERSEN PRIOR TO THE RUNNING OF THE STATUTE OF LIMITATIONS.**

**A. The District Court Did Not Abuse Its Discretion When it Decided the Statute of Limitations Issue After Appellant Conceded, in Response to Dr. Andersen's Motion to Dismiss, that Dr. Andersen Had Not Been Adequately Served with Process.**

Minnesota courts can and have decided dismissal based upon simultaneously raised defenses of insufficiency of service of process and the running of the applicable statute of limitations.<sup>4</sup> Directly on point is Johnson v. Huseby, 469 N.W.2d 742, 745 (Minn. Ct. App. 1991) review denied, Aug. 2, 1991. In that case the Court was presented with two issues. Id. at 744. The first issue was whether service by the sheriff outside of the 60-day period for service of process provided for by Minn. R. Civ. P. 3.01(c) had been sufficient where the party to be served had been in the state and thus amenable to service for only a portion of the 60-day period. Id. In other words the first issue was whether sufficient service of process had occurred to confer personal jurisdiction over the would-be defendant. Id. The second issue in Johnson was whether the applicable statute of limitations had been tolled under Minn. Stat. § 541.13 where the defendant was subject to service of process and the plaintiff had made little or no attempt to find the defendant during the statutory period. Id. The Court of Appeals held: (1) that service of process had been ineffectual under Minn. R. Civ. P. 3.01(c) where the sheriff had not served the party within 60 consecutive days as allowed by the rule, and (2) that the applicable statute of limitations had not been tolled under Minn. Stat. § 541.13. Id. at 745. In short,

---

<sup>4</sup> The relevant limitations period in this case was four years. Minn. Stat. § 541.076.

the Court of Appeals ruled on both issues. The Minnesota Supreme Court denied review. The case is still good law.

The very same issues were presented to the District Court in this case by Dr. Andersen's Motion to Dismiss: (1) whether Dr. Andersen had been properly served, and (2) whether the applicable limitations period has been tolled by Minn. Stat. § 541.13. In light of Johnson, where the Court clearly considered it had the power to decide the statute of limitations issue **after** holding that service of process had been insufficient, the fact that the insufficiency of process in this case had, in effect, already been decided by plaintiff's concession, made in response to Dr. Andersen's motion to dismiss, that Dr. Andersen had not been served, did not preclude the district court from deciding the statute of limitations issue.

Appellant argues that Lewis v. Contracting Northwest, Inc., 413 N.W.2d 154 (Minn. Ct. App. 1987) stands for the proposition that upon a finding of insufficient service of process a court must dismiss the action without prejudice. Lewis, however, is not on point. The issue before the Court in Lewis, however, was not whether to dismiss with or without prejudice; the statute of limitations was not an issue before the Court. Id. Instead, the issue was whether the Court was required to dismiss the claims against the defendant **at all** where service upon the defendant had been insufficient, where the defendant had raised the defense of lack of personal jurisdiction for insufficiency of process in its Answer, and where the defendant had then participated in arbitration of the case before moving for dismissal for insufficiency of service of process. Id. at 155. The Court in Lewis held that service had been insufficient and that the defendant had

preserved and not waived the defense of insufficiency of service of process. Id. at 156-157. The Court did not hold that the district court had no authority to decide any other issue in the case, but instead that it lacked the authority to validate the otherwise insufficient process with a retroactive Order. Id. at 157.

In this case, judicial efficiency also required the district court to rule on whether the statute of limitations had run. In response to Dr. Andersen's Motion to Dismiss, with regard to his attempts at service by publication, appellant conceded only that the "procedural requirements for service by publication were not met" and/or that his attempts at service by process were "technically insufficient." (A87, A91, A94.) In his memorandum to the district court, where appellant argued that the statute of limitations regarding his medical malpractice claim has been tolled, he asserted that "because the statute of limitations has not run, plaintiff retains the option to reserve the defendant." (A94.) Clearly, appellant intended to again attempt service of process upon Dr. Andersen by publication and/or by personal service, thereby forcing Dr. Andersen to spend more time and incur more expense to again establish insufficiency of process even though the applicable limitations period apparently expired on or about May 30, 2004. Under these circumstances, it seems likely that had the district court dismissed the claims against Dr. Andersen without prejudice that appellant would have made more than one subsequent attempt at service of process upon Dr. Andersen – all after the apparent running of the limitations period. Under appellant's jurisdictional theory, he may attempt service of process, Dr. Andersen may be forced to respond, and the district court may be required to decide that service has been insufficient, a potentially infinite number of times

before the district court would have jurisdiction to decide whether the statute of limitations has run. This cannot be right.

For these reasons the district court did not abuse its discretion when it decided the statute of limitations after appellant conceded, in response to Dr. Andersen's motion to dismiss, that Dr. Andersen had not been adequately served with process.

**B. Because Dr. Andersen Was "Subject To Process" at All Relevant Times and Because Appellant Failed to Create a Genuine Issue of Material Fact as to Whether He Conducted a "Diligent Search" for Dr. Andersen, the District Court Did Not Err When It Held that the Statute of Limitations Was Not Tolloed Under Minn. Stat. § 541.13.**

Under Minn. Stat. § 541.13, if a person "departs from and resides out of the state" after a cause of action accrues, there are two grounds for tolling a statute of limitations: (a) if the person is not "subject to process" while out of the state, or (b) if the person cannot be found after a "diligent search." Minn. Stat. § 541.13; Duresky v. Hanson, 329 N.W.2d 44, 47-49 (Minn. 1983); Johnson, 469 N.W.2d at 745.

Plaintiff bears the burden of establishing that the statute of limitations has been tolled. See Doe v. Redeemer Lutheran Church, 531 N.W.2d 897, 900 (Minn. Ct. App. 1995). In the case at bar, therefore, under the requirements of Minn. Stat. § 541.13, the burden was on the appellant before the district court to establish: (a) that Dr. Andersen had not been "subject to process" while in Haiti, or (b) that appellant conducted a "diligent search" for Dr. Andersen, but was unable to locate him.

**1. Dr. Andersen Was at All Relevant Times "Subject to Process."**

Tolling statutes have been enacted to prevent a cause of action arising in this state from becoming unenforceable upon expiration of the statutory limitations period when

personal jurisdiction cannot be obtained because a defendant is not within a state. Long v. Moore, 204 N.W.2d 641, 643 (Minn. 1973); Johnson, 469 N.W.2d at 745. That danger does not exist when it is possible to serve process on a nonresident defendant. See Long, 204 N.W.2d at 643-44; Johnson, 469 N.W.2d at 745. Subdivisions 1. and 2. of Minnesota's long-arm statute provide, in part:

Subdivision 1. As to a cause of action arising from any acts enumerated in the subdivision, a court of this state with jurisdiction over the subject matter may exercise personal jurisdiction over . . . any nonresident individual . . . in the same manner as if . . . the individual were a resident of the state. This section applies if . . . the nonresident individual:

\* \* \*

(c) Commits any act in Minnesota causing injury . . . .

\* \* \*

Subdivision 2. The service of process on any person who is subject to the jurisdiction of the courts of this state, as provided in this section, **may be made by personally serving the summons and complaint upon the defendant outside this state with the same effect as though the summons had been personally served within this state.**

Minn. Stat. § 543.19 (emphasis added.) The long-arm statute therefore makes an out-of-state, would-be defendant, who allegedly committed an act in Minnesota causing injury, "subject to process" by personal service.

Appellant's Complaint alleges that on May 30, 2000, in Moose Lake, Minnesota, Dr. Andersen provided negligent treatment to him and that such treatment caused appellant's claimed injuries. (A60-65.) Under the plain language of Minn. Stat. §543.19, had Dr. Andersen been personally served anywhere outside of the state, the district court would have had personal jurisdiction over him regardless of where he resided at the time of service. Thus Dr. Andersen was "subject to process," from the time of accrual of the

cause of action on May 30, 2000 until the running of the statute of limitations four years later, even while he resided in Haiti. See Johnson, 469 N.W.2d at 745.

Appellant appears to assert that it would not have been possible to serve Dr. Andersen in Haiti because Haiti is not a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (“the Convention”). (See Appellant’s Brief at 15.) This argument is a red herring. The Hague convention codifies service of process and provides for service of process by a “central authority” within countries that are signatories to the Convention. See generally, Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, 20 U.S.T. 361. The Convention does not limit international service of process to only those countries privy to the Convention. Id. In fact Minn. R. Civ. P. 4.04 (c), governing service of process outside of the United States, provides for numerous methods of service of process of claims against residents of foreign countries that have not joined the Convention or other international agreements regarding service of process. Minn. R. Civ. P. 4.04 (c) provides:

Unless otherwise provided by law, service upon an individual, other than an infant or an incompetent person, may be effected in a place not within the state:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) **if there is no internationally agreed means of service** or the applicable international agreement allows other means of service, **provided that service is reasonably calculated to give notice;**

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) **unless prohibited by the law of the foreign country, by**

(i) **delivery to the individual personally of a copy of the summons and the complaint;** or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the court administrator to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

Minn. R. Civ. P. 4.04(c) (emphasis added). Service of process by personal service, the method of service required by the long-arm statute, Minn. Stat. § 543.19, is therefore clearly possible even in countries, like Haiti, that have not joined the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.

As stated, *supra*, appellant bore the burden before the district court of establishing that Dr. Andersen has not been “subject to process” while in Haiti. Appellant did not meet that burden.

**2. Appellant Failed to Create a Genuine Issue of Material Fact as to Whether or Not He Conducted a “Diligent Search” for Dr. Andersen.**

Generally, whether the plaintiff has made a “diligent search” is a fact question. See Duresky, 329 N.W.2d at 49. However, the statute of limitations is not tolled under Minn. Stat. § 541.13 where plaintiff provides no evidence of diligent search. See Johnson, 469 N.W.2d at 745. This is such a case. The evidence regarding appellant’s efforts in his search for Dr. Andersen, even when viewed in a light most favorable to the appellant, creates no genuine issue of material fact as to whether appellant conducted a “diligent search” for Dr. Andersen.

In response to Dr. Andersen’s motion to dismiss, appellant offered no evidence that he or his attorneys did so much as to look through a phone book, search public records, or attempt to locate and contact members of Dr. Andersen’s family or professional or social contacts.

In fact, had appellant taken even the most rudimentary steps to search for Dr. Andersen, he likely would have found him very quickly. For example, appellant learned that that Dr. Andersen might be in Haiti, at the latest, on March 23, 2004 when personnel at MCF-Moose Lake informed the sheriff's deputy attempting service of process that Dr. Andersen was believed to be in Haiti. (A90, A68.) By affidavit and exhibits, Dr. Andersen's attorney established before the district court that at the time of hearing of Dr, Andersen's motion to dismiss, that a quick internet search utilizing the widely-used search engine, "Google," under the terms "'Dr. Steven Andersen" "Haiti'" produced only one result: a web page for the "Cayes Clinic" available on a web site maintained by Lumiere Medical Ministries, the organization that apparently administers the clinic. (R.A. 15.) Both the Google webpage and the Lumiere Medical Ministries webpages were submitted to the district court as exhibits in support of Dr. Andersen's motion to dismiss. (R.A. 13-19.)

The first sentence of the web page for the Cayes Clinic indicates that "the Cayes Clinic is in the south Haitian port of Les Cayes." (R.A. 16-17.) The third paragraph on that page indicates that Dr. Steven Andersen is the director of the clinic. (Id.) If this information were not precise enough to allow appellant to utilize a Haitian law firm or private investigator to locate Dr. Andersen for service of process, an address, phone number, fax number, and email address in North Carolina are provided for Lumiere Medical Ministries at the bottom of the webpage. (Id.) Presumably, appellant could have used this contact information to inquire about the precise location of the clinic. If appellant had any doubts as to whether this was the same "Dr. Steven Andersen," a side bar on the web page, entitled "Missionary Families," includes a link to a photograph of

Dr. Andersen and his family. (R.A. 18-19.) Even a cursory search by appellant's attorney would thus have yielded information about the whereabouts of Dr. Andersen in Haiti.

Rather than provided evidence to the district court of a diligent search, appellant instead argued that his attempt to serve Dr. Andersen's attorney, the sheriff's attempt to serve Dr. Andersen at the Moose Lake Correctional Facility, appellant's mailing the Summons and Complaint to Dr. Andersen's last-known address, appellant's attempt to serve Dr. Andersen by publication, and that merely having been informed by the Affidavit of Dr. Andersen's attorney that Dr. Andersen resides in Haiti somehow all amounted to a "diligent search" for Dr. Andersen. (A87-96.) Appellant makes these same arguments on appeal. In fact, with one minor exception, none of these actions appears to have involved any active "searching" at all.

Appellant's first attempt to serve Dr. Andersen was to mail a copy of the Summons and Complaint to Dr. Andersen's attorney, Robert Mahoney, on or about March 19, 2004. (A66.) On March 22, 2004, after appellant learned that Mr. Mahoney had not been authorized to accept service, appellant attempted to serve Dr. Andersen at the Moose Lake Correctional Facility. (A68-69.) As this is the facility in which the alleged negligent treatment occurred, this also demonstrates no active effort to search for Dr. Andersen. Through that attempt at service, appellant learned that Dr. Andersen was "in Haiti or on a missionary trip." (A90, A68.) Appellant has been unable to point to any evidence that he or his attorneys made any effort to follow up on this information. Instead, as part of an attempt to serve Dr. Andersen under Minn. Stat. § 45.028, appellant then mailed a copy of the Summons and Complaint to Dr. Andersen's last-known mailing

address in West Palm Beach Florida. (A90, A70-71.) It is not known what effort was required by appellant or his attorney to discover Dr. Andersen's last known mailing address in West Palm Beach, Florida.

Appellant then attempted service by publication upon Dr. Andersen. (A90, A72-74.) Appellant's attempt at service by publication cannot be properly described as an effort **to search** for Dr. Andersen. The only evidence appellant provided to the district court of any effort to "search" for Dr. Andersen is the effort it may have taken to learn of Dr. Andersen's last-known mailing address in West Palm Beach, Florida.

Appellant's exhibits and his recitation of the facts in his Brief establish that appellant made almost no effort to search for Dr. Andersen. In light of appellant's failure to point to significant evidence of a diligent search, and in light of the evidence presented to the district court by Dr. Andersen's attorneys regarding the relative ease with which it was and is possible to obtain information about the whereabouts of Dr. Andersen in Haiti, the district court did not err when it held there was no genuine issue of material fact as to whether appellant conducted a "diligent search" for Dr. Andersen.

**III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN, PURSUANT TO MINN. STAT. § 145.682, IT GRANTED DISMISSAL OF APPELLANT'S CLAIMS FOR DAMAGES FOR LONG-TERM AND/OR PERMANENT INJURIES COMPLETELY UNSUPPORTED BY EXPERT OPINION.**

**A. Legal Standard for Motions to Dismiss Under Minn. Stat. § 145.682 and Relevant Caselaw.**

In actions against health care providers, a *prima facie* case of malpractice is established by showing (1) the standard of care recognized by the medical community as applicable to the particular defendant, (2) that the defendant departed from that standard,

and (3) that the departure was a direct cause of the plaintiff's injuries. Fabio v. Bellomo, 504 N.W.2d 758, 762 (Minn. 1993); Plutshack v. University of Minnesota Hosp., 316 N.W.2d 1, 5 (Minn. 1982). The plaintiff bears the burden of establishing that it is more probable than not damages resulted from the malpractice of the health care provider. Id.

Under longstanding Minnesota law, in order to establish a *prima facie* case of medical negligence, the plaintiff must offer competent expert testimony as to both the standard of care and the defendant's departure from that standard. See *e.g.*, Sorenson v. St. Paul Ramsey Medical Center, 457 N.W.2d 188, 191 (Minn. 1990); Anderson v. Rengachary, 608 N.W.2d 843, 846 (Minn. 2000); Teffeteller v. University of Minnesota, 645 N.W.2d 420 (Minn. 2002). Plaintiff must also present competent expert testimony showing that the defendant's action or inaction was a direct cause of the injury. Id. Unless a medical negligence claim involves issues within an area of common knowledge, expert testimony is necessary to support all but the most obvious medical negligence claims. Haile v. Sutherland, 598 N.W.2d 424, 428 (Minn. Ct. App. 1999).

This well-settled common law requirement has been codified by Minn. Stat. § 145.682, which requires a plaintiff alleging medical malpractice to serve upon defendants within 180 days of the suit's commencement, an affidavit or affidavits that disclose the identity of each expert who will testify on plaintiff's behalf at trial, the substance of their testimony, and a summary of the grounds for their opinions. Minn. Stat. § 145.682, subds. 2 and 4(a). These affidavits, frequently referred to as "affidavits of expert identification" require detailed disclosures and must be signed by plaintiff's experts. Id.

Subdivision 4 requires that:

- (a) The affidavit... must be signed by each expert listed in the affidavit and by the plaintiff's attorney and state the identity of each person whom the 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. Answers to interrogatories that state the information required by this subdivision satisfy the requirements of this subdivision if they are signed by the plaintiff's attorney and by each expert listed in the answers to interrogatories and served upon the defendant within 180 days after commencement of the suit against the defendant.

Minn. Stat. § 145.682, subd. 4(a).

Failure to comply with these requirements 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. The District Court Did Not Abuse Its Discretion When it Dismissed Appellant's Claims for Damages for Long-Term and/or Permanent Injuries Pursuant to Minn. Stat. § 145.682 Because Appellant's Only Affidavit to Expert Identification Fails to Address Causation of Appellant's Alleged Long-Term and/or Permanent Injuries.**

**1. The Statute Required Appellant's Affidavit of Expert Identification to Outline a Detailed Chain of Causation Connecting the Alleged Departure from the Standard of Care to Appellant's Claimed Injuries.**

The primary purpose of the affidavit of expert identification required by Minn. Stat. § 145.682 "is to illustrate 'how' and 'why' the alleged malpractice caused the injury." Maudsley v. Pederson, 676 N.W.2d 8, 14 (Minn. Ct. App. 2004) (citing Teffeteller, 645 N.W.2d at 429 n.4). Since adoption of Minn. Stat. § 145.682, the Minnesota Supreme Court has reviewed numerous cases involving claims where expert testimony was necessary to establish a *prima facie* case of medical negligence. The

Minnesota Supreme Court has consistently required a strict construction of the statutory mandates of Minn. Stat. § 145.682. See *e.g.* Teffeteller, 645 N.W.2d at 429-430; Anderson, 608 N.W.2d at 848; Lindberg v. HealthPartners, Inc., 599 N.W.2d 572, 576 (Minn. 1999); Stroud v. Hennepin County Medical Center, 556 N.W.2d at 552, 556 (Minn. 1996); Sorenson, 457 N.W.2d at 193. As originally stated by the court in Sorenson, “it is not enough for the plaintiff’s affidavit of expert identification to simply repeat the facts in the hospital or clinical record. The affidavit should set out how the expert will use those facts to arrive at opinions of malpractice and causation.” Sorenson, 457 N.W.2d at 192. In finding that plaintiffs’ expert disclosures were simply “empty conclusions” which failed to satisfy the requirements of Minn. Stat. § 145.682, the Sorenson court emphasized:

Plaintiffs will be expected to set forth... specific details concerning their expert’s 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 resulted in damage to them.

Id. at 193 (emphasis added).

Stroud was a medical malpractice action arising out of the death of Geneva Stroud as a result of a subarachnoid hemorrhage. The Minnesota Supreme Court again emphasized that plaintiff’s expert affidavit must set forth “specific details concerning the expert’s expected testimony, including the applicable standard of care, the act or omissions which the plaintiff alleges resulted in the violation of the standard of care, and the plaintiff’s damages.” Stroud, 556 N.W.2d at 555-56. In holding that plaintiff’s expert affidavit was insufficient, the court stated:

In light of Sorenson, it is clear that Dr. Tredal's June 21 affidavit did not meet the requirements of the statute. The affidavit provides only broad conclusory statements as to causation. The affidavit does not provide an outline of the chain of causation between the alleged violation of the standard of care and the claimed damages. According to Geneva Stroud's death certificate, her immediate cause of death was a pulmonary embolism, not a subarachnoid hemorrhage. Dr. Tredal's June 21 affidavit does not connect Geneva Stroud's pulmonary embolism to the delay in diagnosing the subarachnoid hemorrhage; rather, Dr. Tredal simply opines that the delay in diagnosis caused a 'complicated hospital stay.'

Stroud, 556 N.W.2d at 556 (emphasis added).

Lindberg was a medical malpractice case arising out of the stillbirth of Lukas Lindberg. The Minnesota Supreme Court found plaintiff's expert disclosure insufficient and further reiterated its prior interpretations of the statute stating:

It is clear that Dr. Cruikshank's September 20, 1996 affidavit contains nothing more than broad and conclusory statements as to causation. (Citation omitted.) It states that Dr. Cruikshank is familiar with the applicable standard of care but fails to state what it was or how the appellants departed from it, it fails to recite any facts upon which Dr. Cruikshank will rely as a basis for his expert opinion, ...[and] it fails to outline a chain of causation connecting the alleged failure to instruct Ms. Lindberg to seek immediate medical attention with the stillbirth of the decedent and it fails to even identify the medical condition for which Ms. Lindberg allegedly was not given attention.

Lindberg, 599 N.W.2d at 578.

The Supreme Court rejected plaintiff's arguments that strict compliance with Minn. Stat. § 145.682 should be excused in the absence of prejudice to defendant, failure of defendant to prove plaintiff's claim as frivolous, or failure of defendant to alert plaintiff to the inadequacy of the disclosure stating:

The statute provides for no such exception and it is not for the courts to read into a clear statutory scheme something that plainly is not there. Dismissal is mandated under Minn. Stat. § 145.682, subd. 6, when the disclosure requirements are not met and while we certainly recognize that the statute may have harsh results in some cases, it cuts with a sharp but

clean edge. It is the legislative choice to implement the policy of eliminating frivolous medical malpractice lawsuits by dismissal.

Id.

Anderson was a medical malpractice action arising out of the defendant surgeon's performance of an anterior cervical discectomy and fusion, and plaintiff's subsequent development of postoperative dysphasia. In keeping with the mandate of Minn. Stat. § 145.682, subd. 6, the Supreme Court concluded that dismissal was required where plaintiff made no attempt to "outline a chain of causation" which allegedly resulted in injury to the plaintiff. Anderson, 608 N.W.2d at 848. The court noted the language of the statute is "plain and clear" and the district court did not abuse its discretion in dismissing plaintiff's suit for failing to comply with the statutory requirements. Id. at 850.

This standard was reaffirmed by the Minnesota Supreme Court in Teffeteller. Teffeteller was a medical malpractice action arising out of the death of 14-year old Thad Roddy following a bone marrow transplant to treat leukemia and postoperative management of pain with morphine. Teffeteller, 645 N.W.2d at 422. Plaintiff alleged the child's death was caused by the medical defendants' failure to recognize signs of morphine toxicity and to appropriately treat the alleged toxicity so as to prevent the child's death. Id.

The Teffeteller court held that the affidavit of plaintiff's expert failed to meet the substantive requirements of Minn. Stat. § 145.682 because it treated the cause of death summarily, failing to outline the chain of causation between the alleged failure to

recognize and treat morphine toxicity and the prevention of the child's death. Id. at 428.

The Supreme Court concluded:

This statement is remarkably similar to the statement of causation found in the affidavit deemed insufficient in Stroud. [Quote omitted.] As in Stroud, the expert affidavit submitted by respondent here contains only broad, conclusory statements regarding causation and fails to set forth the chain of causation connecting the failure to treat Roddy for morphine toxicity and his death, as required by the statute.

Id. at 429 (citations omitted.) Because the expert affidavit failed to provide any meaningful disclosure, dismissal with prejudice was mandated. Id. at 431.

In 2004, the Minnesota Court of Appeals decided a case where the plaintiff alleged that a delay in treatment of a post-operative infection caused vision loss in one eye. Maudsley, 676 N.W.2d at 10. The Court found that the plaintiff's expert disclosure contained only general conclusory statements and held that the disclosures were not sufficient to satisfy the strict standards of the affidavit requirements. Id. at 14.

Thus, dismissal is required where the disclosures of plaintiffs' experts' opinions offer only broad and conclusory statements regarding causation, where they treat the cause of plaintiff's injuries summarily, and/or where they fail to outline a chain of causation connecting the alleged departure from the standard of care to the claimed injuries. See Teffeteller, 645 N.W.2d at 429-430; Anderson, 608 N.W.2d at 848; Lindberg, 599 N.W.2d at 576; Stroud, 556 N.W.2d at 556; Sorenson, 457 N.W.2d at 193; Maudsley, 676 N.W.2d at 14.

**2. Appellant's Affidavit of Expert Identification Does Not Even Address Causation of Appellant's Claimed Long-Term and/or Permanent Injuries to His Eyes and Skin.**

With regards to the critical element of causation, Dr. Boyd's affidavit only offers an opinion as to appellant's second-degree burns – *i.e.* appellant's short-term dermatological injuries. In his affidavit, Dr. Boyd does not offer **any opinion** as to whether or not the UV exposure actually caused plaintiff's claimed long-term dermatological injuries, *i.e.* extreme sensitivity to sunlight resulting in the rash-like, acne-like, or blister-like symptoms after exposure. (*Id.*)

Dr. Boyd's affidavit does not explain how the rash-like, acne-like, or blister-like breakouts plaintiff claims to suffer as a result of his UV exposure differ from the rash-like, acne-like, and blister-like symptoms that his medical records show he suffered from **before** the UV treatment he received on May 31, 2000. (A105-107.) The affidavit does not address appellant's medical history and potential alternative causes of the plaintiff's claimed dermatological symptoms. (*Id.*) In fact, Dr. Boyd's affidavit does not explain how it is possible, or even **if** it is possible, that 15 minutes (eight minutes to the front and seven minutes to the back) of UV exposure could result in long-term and/or permanent injuries of the nature described by appellant. (*Id.*)

With regard to the claimed injuries to appellant's eyes, appellant has offered no expert affidavit or responses to interrogatories signed and sworn by a qualified expert.

C. **Minn. Stat. § 145.682 Required Appellant to Provide Affidavits from Qualified Expert Witnesses that Provide a Detailed Outline of the Chain of Causation Between Defendants' Alleged Negligence and Each of Plaintiff's Claimed Injuries.**

A trial court must consider a defendant's dispositive motions on each of plaintiff's theories of liability. See *e.g. Kaiser-Bauer v. Mullan*, 609 N.W.2d 905 (Minn. Ct. App. 2000) (in medical negligence case, defendant was entitled to JNOV on theories improperly submitted to the jury, and to a new trial on the remaining theories, where trial court submitted several liability theories to the jury and it could not be determined whether the jury based its verdict on a theory properly submitted to the jury or on a theory not properly submitted.) As stated above, failure to comply with the expert affidavit requirements of Minn. Stat. § 145.682 "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. (emphasis added.)

Also as stated above, Dr. Boyd's affidavit only addresses causation of appellant's second-degree burns – *i.e.* appellant's short-term dermatological injuries.<sup>5</sup> Accordingly, although appellant himself attributes a long list of claimed injuries to defendants' alleged negligence, plaintiff's disclosed expert opinions do not establish that plaintiff has a *prima facie* case for any of his claimed injuries other than the second-degree burns.

---

<sup>5</sup> It is worth noting that although defendant CMS has chosen not to seek dismissal of plaintiff's claims for damages for his short-term dermatological injuries – *i.e.* his second-degree burns – that this short sentence in Dr. Boyd's Affidavit does not even outline a detailed chain of causation between defendants' alleged negligence and his second-degree burns.

Minn. Stat. § 145.682 is designed to allow defendants in medical negligence cases to bring motions to dismiss “in order either to eliminate frivolous lawsuits or to give the plaintiff an opportunity to cure any defects prior to trial.” Maudsley, 676 N.W.2d at 12.

Plaintiff’s argument that as long as the submitted affidavit of expert identification sufficiently establishes causation for any one of plaintiff’s claimed injuries he has established a *prima facie* case for all of his claimed injuries in satisfaction of the requirements of the statute is nonsensical. Minnesota courts have not exercised such an all-or-nothing approach to application of the requirements of Minn. Stat. § 145.682. Instead, the courts have applied the statute not just to dismiss entire cases but to narrow claims in particular cases. See e.g. Broehm v. Mayo Clinic, 690 N.W.2d 721 (Minn. 2005) (whereby the Court affirmed District Court’s dismissal of three of four medical malpractice claims for noncompliance with expert witness disclosure requirements of Minn. Stat. § 145.682 but reversed District Court’s dismissal of claims regarding nursing care.)

Carried to its logical extreme, appellant’s argument would allow plaintiffs in medical malpractice cases to serve affidavits of expert identification adequate to establish causation for only very minor injuries and nonetheless proceed to litigate claims for substantial injuries unsupported with expert opinion. If this is what the statute allowed, plaintiffs’ attorneys in all medical malpractice cases long ago would have begun using such an approach in the litigation of their clients’ cases and the case law that has developed under Minn. Stat. § 145.682 would be far different than it is.

In his brief, appellant states that his medical records indicate that he “continues to suffer, at a minimum, long-term effects of his injuries.” (Appellant’s Brief, at 17.) This

kind of assertion is precisely the problem that Minn. Stat. § 145.682 is meant to address. Appellant's medical records do nothing more than document appellant's complaints of various symptoms and his treating physicians' various efforts to diagnose the causes of appellant's claimed symptoms and to care for and treat appellant's claimed symptoms. Appellant's medical records **do not** establish that any of the symptoms appellant claims to suffer from are "long-term effects" of any injuries he alleged sustained as a result of defendants' negligence. Instead, the testimony of a qualified expert is necessary for appellant to establish exactly how defendants' alleged negligence directly caused each one of his claimed long-term and/or permanent injuries.

What Minn. Stat. § 145.682 clearly requires is for appellant to have provided, within 180 days of commencement of this action, or within 45 days of being served with defendants' motions to dismiss pursuant to the statute, a detailed affidavit from a qualified expert that illustrates 'how' and 'why' the alleged malpractice caused each injury. Maudsley, 676 N.W.2d at 14 (citing Teffeteller, 645 N.W.2d at 429 n.4). Appellant failed to do so, even when given the opportunity to cure the inadequacies of appellant's expert disclosure prior to the hearing of respondent's motion to dismiss. Accordingly, the district court did not abuse its discretion when it dismissed appellant's claims for damages for appellant's long-term and/or permanent injuries.<sup>6</sup>

---

<sup>6</sup> Appellant's assertion, in a footnote on page 17 of appellants' Brief, that the district court's grant of partial dismissal leaves undisturbed appellant's claims for damages for long-term and/or permanent injuries pursuant to his battery claim is without merit. First, appellant did not raise this issue before the district court. Second, where as a result of technical error rather than a substantial and obvious deviation from the intended procedure, a medical procedure is of a different nature than that consented to by the patient, a medical battery claim sounds in medical negligence and must be established through expert testimony, and is thus subject to the requirements of Minn. Stat. § 145.682 Haile v. Sutherland, 598 N.W.2d 424, 429 (Minn. Ct. App. 1999) (citations omitted.)

**D. Plaintiff's Case is Not a Rare Medical Malpractice Case Whereby Expert Testimony is Not Required.**

Plaintiff cites Tousignant v. St. Louis County, 615 N.W.2d 53 (Minn. 2000), in support of his argument that that he is not required under Minn. Stat. § 145.682 to support his claims for long-term and/or permanent injuries with expert opinion. (Appellant's Brief at 19.) Tousignant involved a claim that a nursing home breached the standard of care by failing to follow physician's orders to restrain the plaintiff, an 86 year-old resident prone to confusion and wandering, and that such negligence caused plaintiff to fall and fracture her hip. Tousignant, 615 N.W.2d at 58. In Tousignant, the Court held that causation of the claimed injury, the hip fracture, was within "the general knowledge and experience of a lay person." Id. at 60. The Tousignant court wrote "It is a matter of common knowledge and experience that an elderly person, confused and recovering from a fractured hip, who was likely to attempt to walk without assistance if left unattended, also likely would fall." Id. Causation of plaintiff's claimed injuries in this case, however, involves complex scientific issues. Whether or not overexposure to UV light can cause, and in this case has caused, long-term and/or permanent dermatologic photosensitivity, ophthalmologic photophobia, chronic dry eye syndrome, etc., are not matters within the general knowledge and experience of lay persons. Thus, Tousignant is not applicable to the case at bar and plaintiff cannot establish that defendants' alleged negligence caused such claimed injuries without the support of expert testimony. Accordingly, the expert affidavit requirements of Minn. Stat. § 145.682 apply to plaintiff's claims regarding causation of his alleged injuries.

**IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT HELD THAT APPELLANT FAILED TO ESTABLISH EXCUSABLE NEGLIGENCE AND WAS THEREFORE NOT ENTITLED TO RETROACTIVE EXTENSION OF THE EXPERT DISCLOSURE DEADLINE IMPOSED BY THE DISTRICT COURT'S SCHEDULING ORDER OR THE 180-DAY STATUTORY DEADLINE.**

**A. Plaintiff Was Not Entitled to Extension of the Statutory Deadline Past the 180-Day Time Limit Because He Failed To Establish Excusable Neglect.**

If a plaintiff fails to comply with the disclosure requirement of Minn. Stat. § 145.682, a defendant is entitled to a dismissal of each of the plaintiff's claims for which expert testimony is required. Minn. Stat § 145.682, subs. 2, 4, 6.; Sorenson v. St. Paul Ramsey Med. Ctr., 444 N.W.2d 848, 853 (Minn. Ct. App. 1989) (aff'd as modified, 457 N.W.2d 188 (Minn. 1990) (modifying on other grounds)). A plaintiff, however, may be allowed to extend the expert disclosure deadline past the 180-day statutory time limit "by order of the court for good cause." Minn. Stat. § 145.682, subd. 4(b) (2004).

The rules of civil procedure provide that a district court may in its discretion "upon motion made after the expiration of the specified period permit the [required] act to be done where the failure to act was the result of excusable neglect. . . ." Minn. R. Civ. P. 6.02; see also Stern v. Dill, 442 N.W.2d 322, 324 (Minn. 1989) (holding that requirements of Minn. Stat. § 145.682 must be read in conjunction with Minn. R. Civ. P. 6.02). Excusable neglect in the context of failure to serve an expert-witness disclosure in a medical-malpractice action exists 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 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. Anderson, 608 N.W.2d at 850 (upholding the district court's dismissal of a medical-malpractice claim for failure to comply with disclosure requirements of Minn. Stat. § 145.682, subd. 4.) But a plaintiff is not entitled to relief under rule 6.02 if he or she does not have a reasonable excuse for the failure to provide a sufficient disclosure in a timely fashion. Moen v. Mikhail, 454 N.W.2d 422, 427 (Minn. 1990) (explaining that a plaintiff with no reasonable excuse for not supplying a sufficient expert-witness disclosure is not entitled to a rule 6.02 extension).

In this case, appellant did not establish reasonable excuse for his failure to meet the statutory deadline, or that he proceeded with due diligence after notice of the deficiencies of plaintiff's expert affidavit.

**1. If Appellant Established that He Has a Reasonable Case on the Merits, That Case is Only for Plaintiff's Claim that Relates to His Short-Term Dermatological Injury, i.e., His Second Degree Burns.**

Appellant did not establish, and there was no way for the district court or for respondents to evaluate, whether appellant had a reasonable case on the merits as to his claims relating to his long-term and/or permanent injuries – the claims at issue in defendants' motion for partial dismissal – because the affidavit of expert identification submitted by appellant only addresses causation of appellant's second degree burns. (A105-107.)

**2. Appellant Did Not Establish a Reasonable Excuse for Failing to Meet the Statutory Time Limits.**

Appellant essentially argues that his failure to provide sufficient expert affidavits within the 180 day period prescribed by the statute is excusable neglect because

appellant's incarceration made it difficult for him to see a physician of his own choosing. Department of Corrections policy at all times during appellant's incarceration provided him with the opportunity to see a physician of his own choosing, for whatever reason, as long as appellant paid the full costs of the visit. (R.A. 82-83, R.A. 80-81, A166-167.) Appellant asserted, however, that the policy is "arduous" and has thus prevented him from seeking out medical opinions relative to his claims of permanent injury. (Id.)

The medical events at issue in this case occurred more than four years prior to respondents' motion for partial dismissal. Appellant's expert dermatologist, Dr. Alan S. Boyd completed his review of appellant's case more two and a half years ago prior to respondents' motion, as evidenced by his Affidavit of Expert Identification dated July, 2, 2002. (A105-107.) Accordingly appellant had the relevant medical records for at least that long.

In Broehm, the Minnesota Supreme Court held that the District Court had not abused its discretion in denying plaintiff's motion to extend Minn. Stat § 145.682's 180-day expert-disclosure deadline. Broehm, 690 N.W.2d at 728. In affirming the district court's denial of an extension, the Supreme Court noted that plaintiff had copies of her medical records well in advance of commencing her medical malpractice action and that at the time of the hearing of her motion for extension she had been in possession of the relevant medical records for more than a year. Id. The Court therefore concluded that the plaintiff had sufficient information from which to obtain the required expert review well before the 180-day deadline. Id. In this case, plaintiff not only had the relevant medical records for more than two years before the 180-day deadline but also knew for just as long that Dr. Boyd's opinions only addressed causation of plaintiff's second-

degree burns. Plaintiff, therefore, has had more than adequate time in which to seek expert review even with the limited constraints imposed by plaintiff's incarceration and the D.O.C. policy cited by plaintiff. In light of these facts, denial of plaintiff's motion for extension was clearly within the district court's discretion.

Appellant argues that he was only first provided with notice of the deficiencies of Dr. Boyd's notice on December 17, 2005 when he was served with defendants' motion for partial dismissal. For two reasons this argument is a red herring.

First, it was not incumbent upon the respondents to provide prior notification of the deficiencies of Dr. Boyd's affidavit. The Minnesota Supreme Court has very clearly stated that "failure of defendant to alert appellant to the inadequacy of the affidavit of expert identification will not excuse or justify an affidavit of expert identification falling short of the substantive disclosure requirement." Anderson, 608 N.W.2d at 850 (quoting Lindberg, 599 N.W.2d at 575-79).

Second, appellant's attorney was first notified verbally by respondents on October 21, 2004, more than three months prior to the date of this hearing, of respondents' assessment of the deficiencies of Dr. Boyd's affidavit regarding causation of appellant's claimed long-term and/or permanent injuries. (R.A. 78-79.)

Appellant's argument that he was prevented from seeking expert review by the D.O.C. policy requiring pre-payment of the costs of medical appointments for inmates who choose to see their own physicians, is similarly spurious. Costs associated with medical examination for the purposes of establishing causation and damages in a medical malpractice lawsuit are costs of litigation. When appellant and his attorneys decided to bring this action they assumed the burden of the expenses associated in building their

case. It is outrageous for appellant to request that respondents bear the burden of any portion of these costs and then to subsequently cite respondents' refusal to do so as evidence of appellant's reasonable excuse for his failure to meet the statutory time limits.

For these reasons, appellant did not establish a reasonable excuse for failure to provide a sufficient affidavit within the 180-day time limits and the district court did not abuse its discretion when it denied appellant's motion for retroaction extension of the expert disclosure deadlines.

**3. Appellant Offered No Evidence that He Has Proceeded with Due Diligence.**

As of July 2, 2002 when Dr. Boyd signed his affidavit, appellant and his attorneys knew or should have known that Dr. Boyd would not or could not offer a sufficient opinion as to causation of appellant's claimed long-term and/or permanent injuries. Appellant has offered no evidence that he has **at any time**, including the period of time since service of respondents' motion for partial dismissal, made any requests to the D.O.C. for permission to see an outside physician of his own choosing and at his own expense that have been denied or delayed. Appellant has offered no evidence that he has sought a referral from a CMS physician for photo-patch testing at the Mayo Clinic at his own expense that has been denied or delayed. Instead appellant merely asserts that after respondents served their motion for partial dismissal he requested and was denied a waiver of the prepayment requirement by D.O.C. (Appellant's Brief at 20.) For the reasons stated above, this does not demonstrate sufficient due diligence to establish excusable neglect.

For the reasons stated above, plaintiff cannot establish reasonable excuse for his failure to meet the 180-day timeline for service of an adequate affidavit of expert identification under Minn. Stat. § 145.682, or that he has proceeded with due diligence to cure the deficiencies of plaintiff's expert affidavit. Plaintiff, therefore, cannot establish excusable neglect. Accordingly, the district court did not abuse its discretion when it denied appellant's motion for a retroactive extension of the expert disclosure deadline created by the district court's Scheduling Order and the 180-day statutory deadline.

### CONCLUSION

For the reasons stated above, respondents Steven Andersen, M.D. and Correctional Medical Services, Inc. respectfully requests that the district court's Orders of August 24, 2004, February 15, 2005 and February 16, 2005 be affirmed in their entirety.

DATED: September 21, 2005

Respectfully submitted,

GERAGHTY, O'LOUGHLIN & KENNEY,  
Professional Association

By



Mark W. Hardy (#311121)  
386 North Wabasha Street, #1400  
Saint Paul, MN 55102  
(651) 291-1177

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

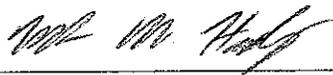
**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportionally-spaced 13-point Times New Roman font. The length of this brief contains 11,362 words. This brief was prepared using Microsoft Word 2000.

DATED: September 21, 2005

Respectfully submitted,

GERAGHTY, O'LOUGHLIN & KENNEY,  
Professional Association

By   
Mark W. Hardy (#311121)  
386 North Wabasha Street, #1400  
Saint Paul, MN 55102  
(651) 291-1177

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

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).